(27,259)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 504.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, PLAINTIFF IN ERROR,

vs.

WALSTEIN G. SMITH.

IN ERROR TO THE DISTRICT COURT, DIVISION No. 1, OF THE TERRITORY OF ALASKA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 14, 1920.

1 In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1793 A.

ALASKA FISH SALTING & BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

vs.

W. G. SMITH, Defendant.

Amended Complaint.

Comes now the above named plaintiff and for cause of action complains and alleges:

I.

That the plaintiff is now and at all times hereinafter mentioned, was, a corporation duly organized and existing under the laws of the State of Oregon, and duly authorized to engage in business in the Territory of Alaska, and that it has paid all of its annual license fees and taxes last due to the said Territory of Alaska;

II.

That the defendant is now and at all times since on or about August 1, 1913, has been the duly appointed, qualified and acting Treasurer for and of the Territory of Alaska;

III.

That plaintiff is engaged in the fishing business and industry, and particularly in the manufacture and production of fish oil, fertilizer and fish meal and by-products from herring fish either in whole or in part, at and in the vicinity of Killisnoo, in said Territory, and it and its predecessors in interest have been so engaged in said business at said place continuously and at all times since the year 1886; that in order to successfully carry on said business and industry plaintiff and its predecessors in interest at all times since 1886 have maintained and constructed, and plaintiff
2 does now maintain a large and valuable plant consisting of docks, warehouses, storehouses, factory, and other appurtenances and buildings at said place; that said business and industry in which plaintiff is so engaged and in which it and its predecessors in interest have been so engaged, is a useful, legitimate and commendable business and industry and is of use and value to the economic, industriel and commercial welfare of the Territory of

Alaska and the United States of America, in that it produces, among other things, fish oil, fish meal, fertilizer, glycerine, salt fish, and by-products, but that said business, is conducted, and it is necessary to conduct said business on a close and narrow margin of profits, and it is impossible to successfully carry on, conduct and maintain said business and industry if said plaintiff be required and compelled to pay unreasonable, prohibitive, confiscatory, excessive, exorbitant, extortionate, oppressive, or discriminatory taxes or licenses;

IV.

That without authority of law and contrary to the Organic Act of the Territory of Alaska, which is the act passed by the Congress of the United States on August 24, 1912, and entitled: "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes," and its amendments, the legislature of Alaska did, unlawfully and illegally, enact on May 1, 1913, a certain act entitled: "An Act to establish a system of taxation, creat- revenue, and provide for the collection thereof for the Territory of Alaska, and for other purposes," i. e., Chapter 52, page 107, Alaska Session Laws, 1913, approved May 1, 1913, and did, unlawfully and illegally, enact on April 29, 1915, an act entitled: "An Act to establish a system of taxation, create revenue, and provide for the collection thereof for the Territory of Alaska,
and for other purposes; and to amend an act entitled; 'An
3 Act to establish a system of taxation, create revenue, and provide for collection thereof for the Territory of Alaska, and for other purposes,' approved May 1, 1913, and declaring an emergency," i. e., Chapter 76, page 185, Alaska Session Laws, 1915, approved April 29, 1915, and did, unlawfully and illegally enact on May 3, 1917, an act entitled: "An Act to amend sections 1 and 2 of Chapter 76, Laws of Alaska, 1915, entitled: 'An Act to establish a system of taxation, create revenue, and provide for collection thereof for the Territory of Alaska, and for other purposes, and to amend an act entitled: "An Act to establish a system of taxation, create revenue, and provide for collection thereof for the Territory of Alaska, and for other purposes," approved May 1, 1913, and declaring an emergency, approved April 29, 1915,'" i. e., Chapter 74, page 201, Alaska Session Laws, 1917, approved May 3, 1917, and that each of said acts so enacted by said legislature is, and at all times has been, invalid, illegal, unconstitutional and void for the following, among other reasons, to-wit: That each of said acts attempts to and does amend, alter and modify the fishing laws of the United States and laws of the United States providing for taxes on business and trade in Alaska, passed by the Congress of the United States, and in force prior to and at the time of the adoption of the said Organic Act; and that each of said acts so enacted by said legislature of Alaska was passed without any authority so to do, and is, and at all times has been, contrary to the provisions of said Organic Act; further, in that inter alia each of said acts attempts to and does levy an annual tax, upon plaintiff's property

in the territory of Alaska, for territorial purposes in excess of one per centum of any valuation that might or could be lawfully fixed, upon plaintiff's said property, as a basis for such assessment thereof, although no provision is made in either or any of said acts
4 for the assessment of the valuation of the plaintiff's property in the Territory of Alaska so levied upon; and further, in that the taxes levied under each of said acts are not uniform upon the same class of subjects and are not levied and collected under general laws, nor are said taxes based upon an assessment according to the actual value of the plaintiff's property upon which the taxes are fixed or levied, and further, in that each of said acts deprives plaintiff and others similarly situated of their property without due process of law, and denies them the equal protection of the laws, and is contrary to the Constitution of the United States and to the Fifth and Fourteenth Amendments thereof; and that said act passed by said legislature in 1917, i. e., Chapter 74, Alaska Session Laws, 1917, is particularly void as to this plaintiff in that it is an act, and the subject and object thereof is to abolish and prohibit fish oil works using herring in whole or in part in the manufacture of fish oil, and fertilizer and fish meal plants manufacturing fertilizer and fish meal in whole or in part from herring, which said subject and object of said act is not in any manner expressed in the title of said act, and in that said act further embraces more than one subject, to-wit: at least three subjects in that it levies license taxes upon certain professions, and taxes upon property, and also prohibits and abolishes fish oil works, using herring in whole or in part in the manufacture of fish oil, and fertilizer and fish meal plants, manufacturing fertilizer and fish meal in whole or in part from herring, and further in that it provides and levies a double taxation by reason of the fact that the plaintiff is annually required, compelled and obliged thereby to pay a tax of $2.00 per barrel on fish oil, manufactured from herring either in whole or in part, and $2.00 per ton on fish meal and fertilizer, manufactured from herring either in whole or in part, in addition to which
5 plaintiff is annually required, obliged and compelled to pay on the same and identical fish oil and fish meal a tax of ten cents per barrel of fish oil and twenty cents per ton of fish meal, under the provisions of Sections 259 and 2569, Compiled Laws of Alaska, with which sections, as well as with Chapter 3, Title VII and Chapter 44, Title XV, of said Compiled Laws of Alaska, plaintiff has at all times fully complied in the payment of the taxes and licenses therein provided at the times and in the manner therein required of it as well as with all other provisions and requirements of said sections and chapters;

V.

That said act so enacted by said legislature of Alaska in 1917, i. e. Chapter 74, Alaska Session Laws, 1917, requires and provides that any person, firm or corporation prosecuting or attempting to prosecute in the Territory of Alaska a fish oil works, using herring in

whole or in part in the manufacture of fish oil, shall annually apply for and obtain a license and pay for said license $2.00 per barrel on the fish oil so produced by it, and that any person, firm or corporation prosecuting or attempting to prosecute in the Territory of Alaska a fertilizer and fish meal plant, manufacturing fertilizer and fish meal in whole or in part from herring, shall annually apply for and obtain a license and pay for said license $2.00 per ton on such fertilizer and fish meal so produced by it, and that by reason thereof it is necessary for plaintiff, and plaintiff is required under said act, if it prosecutes or attempts to prosecute its business and industry in Alaska, to wit, the production of fish oil, fertilizer and fish meal from herring either in whole or in part, to apply for and obtain a license and annually pay for said license the sum of $2.00 per barrel for all fish oil so produced and manufactured by it from herring either in whole or in part, and the sum of $2.00 per ton on all fertilizer and fish meal so produced and manufactured by it
6 from herring either in whole or in part, and that plaintiff does use, and, at all the times in which it and its predecessors in interest have been engaged in said business and industry, it and its predecessors in interest have used, herring either in whole or in part, for the manufacture of the fish oil, fertilizer and fish meal produced, and the by-products manufactured out of such oil and meal by it in its said business and industry; and that it is necessary that it use said herring in said business and industry.

VI.

That said acts of said legislature and particularly that portion of said Chapter 74, Alaska Session Laws 1917, i. e., Section 1, 10th Subsection thereof, levying said license tax upon fish oil, fertilizer and fish meal manufactured from herring either in whole or in part, is unconstitutional and void because, and plaintiff so alleges, although purporting to be enacted solely as revenue measures, they were in truth and in fact enacted solely for the purposes of prohibiting and restraining this plaintiff and all others similarly situated from continuing in the said business and industry, and for the purpose of abolishing and prohibiting said business and that if enforced said objects and purposes will be thereby accomplished and plaintiff's property and business and the property and business of all others similarly situated will be thereby confiscated; and that said acts and particularly said sections thereof imposing said tax on fish oil, fertilizer and fish meal manufactured from herring in whole or in part will not and was not intended to produce any revenue for the reason that said tax is so exorbitant and unreasonable, as to be confiscatory and prohibitive that, if said acts and particularly said sections thereof be annually enforced, it will entirely prohibit plaintiff and all others from engaging in the manufacture of fish oil, fertilizer and fish meal from herring either in whole or in part; and that neither said
7 Chapter 74, Alaska Session Laws, 1917, Chapter 76, Alaska Session Laws, 1915, nor Chapter 52, Alaska Session Laws, 1913, provides any regulation whatsoever for the business of manu-

facturing fish oil, fish meal and fertilizer from herring either in whole or in part, in the Territory of Alaska, and that said tax is greatly in excess of the reasonable and necessary costs of any license or regulation whatsoever that could reasonably be required to be exercised over said business or industry; and that the cost of regulating and supervising, and of issuing licenses for, said business and industry is and would be and has been no greater than that of any of the other businesses or industries for which licenses are provided in said acts, but that plaintiff's said industry is arbitrarily, capriciously and unjustly taxed many times more than, i. e. a percentage many times larger than that levied on any other business in the territory, and that said Territory has, and had, no authority or power under its police power, either implied or otherwise, to impose said tax of $2.00 per barrel on fish oil, manufactured from herring either in whole or in part, or $2.00 per ton on fertilizer and fish meal, manufactured from herring either in whole or in part, as a police or other regulation on said business and industy; and that as a matter of fact no regulation or police supervision whatsoever over said business or industry is required or needed or furnished therefor or thereto by said Territory;

VII.

That said license so attempted to be levied by said Chapter 74, Alaska Session Laws, 1917, is excessive, exorbitant, prohibitive, confiscatory, discriminatory, extortionate, oppressive and unreasonable, and, if plaintiff be required to pay the same during each year that it operates it will be obliged to suspend its operations and cease from the said business and industry in which it and its predecessors in interest have been so engaged for many years, which is the
8 object sought to be attained, under the guise of a revenue measure, by said act; and that said license is, as stated, excessive, exorbitant, extortionate, oppressive, prohibitive, confiscatory, discriminatory and unreasonable in that, as hereinbefore stated, and for the following, among other further reasons, it requires the plaintiff to pay a tax of 9.31 per cent. on the gross receipts obtained by it from the manufacture of fish oil, or 84 per cent. on the net profits therefrom, and 4.60 per cent. on the gross receipts received by it from the manufacture of fish meal and fertilizer or 8.18 per cent. on the net profits obtained therefrom, whereas the greatest or highest license tax required of any other industry licensed under said acts or any of them, whose output or products is taxed on an attempted similar basis is as follows: that is to say, said Chapter 74, Alaska Session Laws, 1917, provides that electric light and power plants selling light, power and steam for heat and supplies to the public shall pay a tax of 0.5 per cent. of the gross receipts in excess of $2,500.00 from light, power and steam sold, and 0.5 per cent. of the net profit from supplies sold; that cold storage plants shall pay a tax, depending on their business, ranging from 0.25 per cent. to 0.5 per cent.; that laundries shall pay a tax, depending on their business, ranging from 0.25 per cent. to 0.75 per cent; that meat markets shall pay a tax depending on their business, ranging from 0.13 per cent. to 0.25 per

cent; that mining shall pay a tax of one per cent. of the net income in excess of $5,000.00; that telephone companies shall pay a tax of 0.5 per cent. of the gross receipts in excess of $1,500.00; that water works, selling water or power to the public, shall pay a tax of 0.5 per cent. of the gross receipts in excess of $2,500.00; that salteries, except herring, shall pay a tax of $.025 per one hundred
9 pounds on all fish salted or mild-cured, and that during the year 1917 the selling price of salt fish and mild-cured fish was as follows: $19.00 per 200-lb. barrel, making a tax of 0.26 per cent; that salmon canneries shall pay a tax of $.045 per case on kings, and reds or sockeyes, $.025 per case on medium reds, and $.02 per case on all others; that the prices for salmon, per case, during the year 1917 were as follows:

Per cs.	4 dz. Chinook salmon,	tall,	@	$2.90	dz.	$11.60	tax	4½¢ 0.388%
"	" 4 dz. Sockeye	"	"	@ 2.90	"	11.60	"	4½¢ 0.388%
"	" 4 dz. Alaska Red	"	"	@ 2.35	"	9.40	"	4½¢ 0.478%
"	" 4 dz. Medium Red	"	"	@ 2.00	"	8.00	"	2½¢ 0.313%
"	" 4 dz. Alaska King	"	"	@ 2.25	"	9.00	"	4½¢ 6.500%
"	" 4 dz. Pink	"	"	@ 1.65	"	6.60	"	2¢ 0.303%
"	" 4 dz. Chum	"	"	@ 1.60	"	6.40	"	2¢ 0.328%

the tax ranging from 0.303 per cent. to 0.5 per cent., but averaging a tax of 0.385 per cent. on the industry of canning salmon; whereas during the year 1917 the selling price of fish oil, made from herring in whole or in part, was $21.53 per barrel, which under said act is taxed $2.00 per barrel or 9.31 per cent. on the gross receipts and 84 per cent. on the net profits, and the selling price of fertilizer and fish meal made in whole or in part from herring, for the year 1917, was $43.41 per ton, which was taxed $2.00 per ton under said act, or a tax of 4.6 per cent. on the gross receipts and 8.18 per cent. on the net profits; and that although there are other persons and corporations in the said territory who are engaged in the manufacture of fish oil, fish meal and fertilizer from fish, inasmuch as they do not use herring either in whole or in part, no license or other tax whatsoever is assessed against or levied upon them by the territory of Alaska, and that the said business of said other persons and corporations is in all essentials the same as the business of this plaintiff and there are no existing distinctions that differentiate the said business of plaintiff from said business of said other persons and corporations; and that the levying of a license tax on plaintiff's
10 said business, without levying a similar tax on the manufacture of fish oil, fish meal and fertilizer from fish, other than from herring either in whole or in part, is unreasonable, purely arbitrary, discriminatory and for the purpose of compelling plaintiff to cease its said business and industry, and of prohibiting and destroying plaintiff's said business and industry; and that neither plaintiff, which has been engaged in said business and industry for many years, nor any other person, firm or corporation, can or could continue to remain in said business and industry and continue to carry on said manufacture of fish oil, fish meal and fer-

tilizer from herring either in whole or in part, and pay, as required and compelled by said acts, such excessive, exorbitant, extortionate, oppressive, prohibitive, discriminatory and unreasonable tax, and, as hereinbefore stated, if it be required to pay said tax each year, plaintiff will be obliged to suspend its operations and cease from said business and industry;

VIII.

That plaintiff, in order to successfully carry on its said business, is obliged at the commencement of each fishing season to obtain credit upon the pack and product which it expects and intends to put up and manufacture during the season, and it is and has been long prior to the passage of said acts, plaintiff's custom, and it is necessary for plaintiff, to obtain credit for that purpose at the beginning of each operating season, and in order to obtain and maintain such credit and successfully finance plaintiff's business and said pack and output it is necessary and requisite that plaintiff's plant and said pack and output be kept free and clear from all mortgages, liens, and other incumbrances but that Section 5 of said Chapter 76,
Alaska Session Laws, 1915, provides that all taxes levied or
11 laid or provided for in said Acts, and penalties, fines and interest accrued, are made and declared to be a lien upon the real and personal property of the person, firm or corporation, including plaintiff, liable therefor, paramount and superior to all mortgages, hypothecations, conveyances and assignments and that said Section 5 was not repealed or modified by said Chapter 74, Alaska Session Laws, 1917, but remains in full force and effect, and that said acts of themselves operated as duress upon this plaintiff and obliged and compelled this plaintiff to pay, as hereinafter stated, said license tax of $2.00 per barrel of fish oil manufactured by it from herring in whole or in part, and of $2.00 per ton on fish meal and fertilizer manufactured by it from herring in whole or in part, so levied by said Chapter 74, Alaska Session Laws, 1917, in order that it might continue and remain in business and keep its real and personal property free from the liens provided for by said acts; and if plaintiff had not paid said license taxes, the amount thereof, together with large and unreasonable and excessive penalties, fines and interest, as hereinafter referred to, would under said acts of the said legislature of Alaska, have become a lien upon all real and personal property of plaintiff situate in Alaska, paramount and superior to all mortgages, hypothecations, conveyances and assignments, and that plaintiff would thereby have been prevented from continuing its business and industry and would have had to cease the same, as it could not have obtained credit for and financed its business in the face of such lien and liens.

IX.

That in addition to providing for said licenses to be paid by this plaintiff as aforesaid, said Chapter 76, Alaska Session Laws, 1915,

and said Chapter 74, Alaska Session Laws, 1917, provide
12 that in addition to a civil remedy, any person, firm or corporation, including plaintiff, violating any of the provisions of said acts shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of the amount of the tax with ten per cent. added, for which such person, firm or corporation, is liable, and that each month or fraction of a month in which business, including plaintiff's said business, is carried on in violation of the said acts shall be deemed a separate offense and prosecution therefor may be by information filed by the Attorney General or other authorized legal counsel of the Territory in any court of competent jurisdiction, and upon conviction the court shall enter a judgment for the fine and costs incurred, and such judgment may be enforced as judgments in civil action or by imprisonment at the rate of one day for each $2.00 for such fine and costs; and that said section of said acts and its and their provisions, do and did operate as duress upon plaintiff, and compelled and required it to pay, as hereinafter stated, said license tax of $2.00 per barrel of fish oil manufactured by it from herring in whole or in part, and $2.00 per ton of fish meal and fertilizer manufactured by it from herring in whole or in part, in that, if it had failed to pay the same, it would have been guilty of a misdemeanor and punished by a fine of the amount of the tax with ten per cent. added, and for each month or fraction of a month in which it carried on its said business it would have been guilty of a separate offense and subjected to like fines and penalties therefor, and would not lawfully have been permitted to continue to carry on, conduct and maintain its said business and industry, and that it could not in the face of said provisions carry on its said business without being at all times subjected to becoming financially
wrecked and bankrupt in the payment of said fines and penal-
13 ties which it would have incurred if it had failed to pay said license; and which, with said interest, fines and penalties, would have become a lien paramount and superior to all other liens, upon all its real and personal property in the Territory of Alaska; and that said acts, and said fines and penalties therein provided for violations thereof, are so severe and drastic that plaintiff did not dare fail or refuse to pay them pending such time as would be required to have said acts declared invalid.

X.

That heretofore, to-wit, on or about November 14, 1917, the defendant, and on January 12, 1918, the Territory of Alaska, by its Attorney General, unlawfully and illegally demanded of and required plaintiff to pay said tax on its output for the year 1917, and on January 14, 1918, plaintiff, by reason of said force and duress so exercised upon it by defendant, and by said Territory of Alaska, and by said acts and laws of said Alaska legislature, made a true return and paid, under protest, to said defendant as Treasurer for Alaska, the license and tax for the year 1917, computed on the true amount of fish oil, fish meal and fertilizer, from herring either in whole or in part, manufactured and packed by it during the year 1917, that is

to say, 4,112 barrels of fis hoil at $2.00 per barrel, amounting to $8,224.00, and 1,037 tons of fish meal at $2.00 per ton amounting to $2,074.00, making a total of $10,298.00, which this plaintiff on said date paid to said defendant as such Treasurer as such license tax, under protest and by reason of said duress so exercised upon it, and that at the time of making said payment plaintiff notified said defendant and the Territory of Alaska, and the Territorial Treasurer for Alaska, and each of them knew and have known at all times herein mentioned that plaintiff regarded and considered, that said acts of said legislature were null, void, unconstitutional and il-
14 legal, and that it was paying and paid said taxes under protest and because of said duress so exercised upon it, and that it would hold said defendant, said Territory and said Territorial Treasurer responsible therefor and for the return and refund thereof, and that plaintiff intended to and would bring suit for the recovery and refunding thereof; that at said time and on January 18, 1918, the said defendant notified plaintiff through its then attorneys, that he would hold said moneys so paid, in a special deposit until said acts of said legislature were tested in the courts;

XI.

That heretofore, to-wit, on September 3, 1918, plaintiff demanded from said defendant that he return said sum of $10,298.00 with interest at the rate of eight per cent. per annum from January 14, 1918, to plaintiff, but that defendant has at all times refused and does still refuse, and has entirely failed, to account for, return or refund said sum, with said interest, to plaintiff, and that neither said sum nor said interest has been refunded to plaintiff or to anyone for its use by said defendant, the Territorial Treasurer for Alaska, or the Territory of Alaska, and that by reason of the foregoing facts defendant is indebted to this plaintiff in the sum of, and this plaintiff is entitled to recover from the defendant, $10,298.00 with interest at the rate of eight per cent. per annum from January 14, 1918.

Wherefore, plaintiff prays judgment against the defendant for the sum of $10,298.00 with interest at the rate of eight per cent. per annum from January 14, 1918, and for its costs and disbursements herein incurred and expended.

R. E. ROBERTSON,
Attorney for Plaintiff.

15 UNITED STATES OF AMERICA,
Territory of Alaska, ss:

R. E. Robertson, being first duly sworn on oath, deposes and says: that he is the attorney and agent of the within named corporate plaintiff; that he has read the foregoing amended complaint and know- the contents thereof and that the same is true he verily believes; that the reason that he makes this verification for and on behalf of said plaintiff corporation is that there are no other officers or agents of said plaintiff corporation now in the District of Alaska, but that all of said officers and agents of said plaintiff corporation

are at this time absent from said District of Alaska; that affiant bases his knowledge as to the facts in said amended complaint upon personal knowledge, and upon information furnished him by officers and agents of said plaintiff corporation.

R. E. ROBERTSON.

Subscribed and sworn to before me this 18th day of February, 1919.

L. L. HARDING,
Notary Public for Alaska.

[NOTARIAL SEAL.]

My commission expires 6/30, 1919.

Copy received this 21st of March, 1919.

GEORGE B. GRIGSBY,
Att'y for Def't.

Filed in the Distrct Court, District of Alaska, First Division, Mar. 22, 1919.

J. W. BELL,
Clerk,
By C. Z. DENNY,
Deputy.

16 In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1793-A.

ALASKA FISH SALTING & BY-PRODUCTS COMPANY, Plaintiff,

vs.

W. G. SMITH, Defendant.

Stipulation.

It is hereby stipulated by and between the above parties by their respective counsels that the plaintiff may amend its complaint herein which amended complaint is filed herewith, and that the demurrer heretofore filed by the defendant to the complaint shall be considered as having been filed and being made to said amended complaint.

Dated, Juneau, Alaska, this 21st day of March, 1919.

R. E. ROBERTSON,
Attorney for Plaintiff.
GEORGE B. GRIGSBY,
Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division, Mar. 22, 1919.

J. W. BELL,
Clerk,
By C. Z. DENNY,
Deputy.

17 In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1793-A.

ALASKA FISH SALTING & BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

v.

W. G. SMITH, Defendant.

Demurrer.

Comes now the defendant in the above entitled action and demurs to the complaint of the plaintiff filed herein, on the following grounds:

1. For the reason that the complaint does not state facts sufficient to constitute a *cuase* of action against the defendant.

2. For the reason that there is a defect of parties defendant.

GEORGE B. GRIGSBY,
Attorney General for the Territory of Alaska, Att'y for Defendant.

Receipt of a true and correct copy of the within Demurrer acknowledged this 10th day of February, 1919, and due service admitted thereof.

R. E. ROBERTSON,
Attorney for Plaintiff.

(Endorsed:) No. 1793-A. Original. In the District Court for the Territory of Alaska, Division Number One. Alaska Fish Salting & By-Products Company, a corporation, Plaintiff, v. W. G. Smith, Defendant. Demurrer. George B. Grigsby, Attorney General, Juneau, Alaska.

Filed in the District Court, District of Alaska, First Division, Feb. 10, 1919.

J. W. BELL,
Clerk,
By JOHN T. REED,
Deputy.

18 In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1816-A.

ALASKA FISH SALTING & BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

vs.

W. G. SMITH, Defendant.

Complaint.

Comes now the above named plaintiff and for cause of action complains and alleges:

I.

That the plaintiff is now and at all times hereinafter mentioned, was, a corporation duly organized and existing under the laws of the State of Oregon, and duly authorized to engage in business in the Territory of Alaska, and that it has paid all of its annual license fees and taxes last due to the said Territory of Alaska;

II.

That the defendant is now and at all times since on or about August 1, 1913, has been the duly appointed, qualified and acting Treasurer for and of the Territory of Alaska;

III.

That plaintiff is engaged in the fishing business and industry, and particularly in the manufacture and production of fish oil, fertilizer and fish meal and by-products from herring fish either in whole or in part, at and in the vicinity of Killisnoo, in said Territory, and it and its predecessors in interest have been so engaged in said business at said place continuously and at all times since the year 1886; that in order to successfully carry on said business and industry plaintiff and its predecessors in interest at all times since 1886
19 have maintained and constructed, and plaintiff does now maintain a large and valuable plant consisting of docks, warehouses, storehouses, factory, and other appurtenances and buildings at said place; that said business and industry in which plaintiff is so engaged and in which it and its predecessors in interest have been so engaged, is a useful, legitimate and commendable business and industry and is of use and value to the economic, industrial and commercial welfare of the Territory of Alaska and the United States of America, in that it produces, among other things, fish oil, fish meal, fertilizer, glycerine, salt fish, and by-products, but that said business is conducted, and it is necessary to conduct said business, on a close

and narrow margin of profits, and it is impossible to successfully carry on, conduct and maintain said business and industry if said plaintiff be required and compelled to pay unreasonable, prohibitive, confiscatory, excessive, exorbitant, extortionate, oppressive, or discriminatory taxes or licenses;

IV.

That without authority of law and contrary to the Organic Act of the Territory of Alaska, which is the act passed by the Congress of the United States on August 24, 1912, and entitled "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes," and its amendments, the legislature of Alaska did, unlawfully and illegally, enact on May 1, 1913, a certain act entitled: "An Act to establish a system of taxation, create revenue, and provide for the collection thereof for the Territory of Alaska, and for other purposes," i. e. Chapter 52, page 107, Alaska Session Laws, 1913, approved May 1, 1913, and did, unlawfully and illegally, enact on April 29, 1915, an act entitled: "An Act to establish a system of taxation, create revenue, and provide for the collection thereof for the Territory of Alaska, and for other purposes; and to amend an act entitled: 'An Act to establish a system of taxation, create revenue, and provide for collection thereof for the Territory of Alaska, and for other purposes,' approved May 1, 1913, and declaring an emergency," i. e. Chapter 76, page 185, Alaska Session Laws, 1915, approved April 29, 1915, and did, unlawfully and illegally, enact on May 3, 1917, an act entitled: "An Act to amend sections 1 and 2 of Chapter 76, Laws of Alaska, 1915, entitled: 'An Act to establish a system of taxation, create revenue, and provide for collection thereof for the Territory of Alaska, and for other purposes, and to amend an act entitled: "An Act to establish a system of taxation, create revenue, and provide for collection thereof for the Territory of Alaska, and for other purposes," approved May 1, 1913, and declaring an emergency, approved April 29, 1915,'" i. e. Chapter 74, page 201, Alaska Session Laws, 1917, approved May 3, 1917, and that each of said acts so enacted by said legislature is, and at all times has been, invalid, illegal, unconstitutional and void for the following, among other, reasons, to-wit: That each of said acts attempts to and does amend, alter and modify the fishing laws of the United States and laws of the United States providing for taxes on business and trade in Alaska, passed by the Congress of the United States, and in force prior to and at the time of the adoption of the said Organic Act; and that each of said acts so enacted by said legislature of Alaska was passed without any authority so to do, and is, and at all times has been, contrary to the provisions of said Organic Act; further, in that inter alia each of said acts attempts to and does levy an annual tax, upon plaintiff's property in the territory of Alaska, for territorial purposes in excess of one per centum of any valuation that might or could be lawfully fixed, upon plaintiff's said property, as a basis for such assessment thereof,

although no provision is made in either or any of said acts for the the assessment of the valuation of the plaintiff's property in the Territory of Alaska so levied upon; and further, in that the taxes levied under each of said acts are not uniform upon the same class of subjects and are not levied and collected under general laws, nor are said taxes based upon an assessment according to the actual value of the plaintiff's property upon which the taxes are fixed or levied, and further, in that each of said acts deprives plaintiff and others similarly situated of their property without due process of law, and denies them the equal protection of the laws, and is contrary to the Constitution of the United States and to the Fifth and Fourteenth Amendments thereof; and that said act passed by said legislature in 1917, i. e., Chapter 74, Alaska Session Laws, 1917, is particularly void as to this plaintiff in that it is an act, and the subject and object thereof is to abolish and prohibit fish oil works using herring in whole or in part in the manufacture of fish oil, and fertilizer and fish meal plants manufacturing fertilizer and fish meal in whole or in part from herring, which said subject and object of said act is not in any manner expressed in the title of said act, and in that said act further embraces more than one subject, to-wit, at least three subjects, in that it levies license taxes upon certain professions, and taxes upon property, and also prohibits and abolishes fish oil works, using herring in whole or in part in the manufacture of fish oil, and fertilizer and fish meal plants, manufacturing fertilizer and fish meal in whole or in part from herring, and
22 further, in that it provides and levies a double taxation by reason of the fact that the plaintiff is annually required, compelled and obliged thereby to pay a tax of $2.00 per barrel on fish oil, manufactured from herring either in whole or in part, and $2.00 per ton on fish meal and fertilizer, manufactured from herring either in whole or in part, in addition to which plaintiff is annually required, obliged and compelled to pay on the same and identical fish oil and fish meal a tax of ten cents per barrel of fish oil and twenty cents per ton of fish meal under the provisions of Sections 259 and 2569, Compiled Laws of Alaska, with which sections, as well as with Chapter 3, Title VII and Chapter 44, Title XV, of said Compiled Laws of Alaska, plaintiff has at all times fully complied in the payment of the taxes and licenses therein provided at the times and in the manner therein required of it as well as with all other provisions and requirements of said sections and chapters;

V.

That said act so enacted by said legislature of Alaska in 1917, i. e. Chapter 75, Alaska Session Laws, 1917, requires and provides that any person, firm or corporation prosecuting or attempting to prosecute in the Territary of Alaska a fish oil works, using herring in whole or in part in the manufacture of fish oil, shall annually apply for and obtain a license and pay for said license $2.00 per barrel on the fish oil so produced by it, and that any person, firm or corporation prosecuting or attempting to prosecute in the Territory of

Alaska a fertilizer and fish meal plant, manufacturing fertilizer and fish meal in whole or in part from herring, shall annually apply for and obtain a license and pay for said license $2.00 per ton on such fertilizer and fish meal so produced by it, and that by reason thereof it is necessary for plaintiff, and plaintiff is required
23 under said act, if it prosecutes or attempts to prosecute its business and industry in Alaska, to-wit, the production of fish oil, fertilizer and fish meal from herring either in whole or in part, to apply for and obtain a license and annually pay for said license the sum of $2.00 per barrel for all fish oil so produced and manufactured by it from herring either in whole or in part, and the sum of $2.00 per ton on all fertilizer and fish meal so produced and manufactured by it from herring either in whole or in part, and that plaintiff does use, and, at all times in which it and its predecessors in interest have been engaged in said business and industry, it and its predecessors in interest have used, herring either in whole or in part for the manufacture of the fish oil, fertilizer and fish meal produced, and the by-products manufactured out of such oil and meal by it in its said business and industry; and that it is necessary that it use said herring in said business and industry.

VI.

That said acts of said legislature and particularly that portion of said Chapter 74, Alaska Session Laws 1917, i. e., Section 1, 10th Subsection thereof, levying said license tax upon fish oil, fertilizer and fish meal manufactured from herring either in whole or in part, while ostensibly enacted solely as revenue measures, were in fact enacted for the purposes of prohibiting and restraining, under the guise of a revenue measure, this plaintiff from continuing in its said business and industry, and to abolish plaintiff's said business and to confiscate its property; and that said acts and particularly said sections thereof imposing said tax on fish oil, fertilizer and fish meal manufactured from herring in whole or in part will not produce any revenue for the reason that said tax is so exorbitant, unfair, unreasonable, extortionate, confiscatory and prohibitive that, if said acts and particularly said sections thereof be annually enforced, it will entirely prohibit plaintiff and all others from
24 engaging in the manufacture of fish oil, fertilizer and fish meal from herring either in whole or in part; and that neither said Chapter 74, Alaska Session Laws, 1917, Chapter 76, Alaska Session Laws, 1915, nor Chapter 52, Alaska Session Laws, 1913, provides any regulation whatsoever for the business of manufacturing fish oil, fish meal and fertilizer from herring either in whole or in part, in the Territory of Alaska, and that said tax is greatly in excess of the reasonable and necessary cost of any license or regulation whatsoever that could reasonably be required to be exercised over said business or industry; and that the cost of regulating and supervising, and of issuing licenses for, said business and industry is and would be and has been no greater than that of any of the other businesses or industries for which licenses are provided in said acts,

but that plaintiff's said industry is arbitrarily, capriciously and unjustily taxed many times more than, i. e.: a percentage many times larger than that levied on, any other business in the territory, and that said Territory has, and had, no authority or power under its police power, either implied or otherwise, to impose said tax of $2.00 per barrel on fish oil, manufactured from herring either in whole or in part, or $2.00 per ton on fertilizer and fish meal, manufactured from herring either in whole or in part, as a police or other regulation on said business and industry; and that as a matter of fact no regulation or police supervision whatsoever over said business or industry is required or needed or furnished therefor or thereto by said Territory.

VII.

That said license so attempted to be levied by said Chapter 74, Alaska Session Laws, 1917, is excessive, exorbitant, prohibitive, confiscatory, discriminatory, extortionate, oppressive and unreasonable, and, if plaintiff be required to pay the same during each year that it operates it will be obliged to suspend its operation and cease
25 from the said business and industry in which it and its predecessors in interest have been so engaged for many years, which is the object sought to be attained, under the guise of the revenue measure, by said act; and that said license is, as stated, excessive, exorbitant, extortionate, oppressive, prohibitive, confiscatory, discriminatory and unreasonable in that, as hereinbefore stated, and for the following, among other further reasons it requires the plaintiff to pay a tax of 5.60 per cent. on the gross receipts obtained by it from the manufacture of fish oil, or 113.64 per cent. on the net profits therefrom, and 2.92 per cent. on the gross receipts received by it from the manufacture of fish meal and fertilizer or 28.12 per cent. on the net profits obtained therefrom, whereas the greatest or highest license tax required of any other industry licensed under said acts or any of them, whose output or products is taxed on an attempted similar basis is as follows; that is to say, said Chapter 74, Alaska Session Laws, 1917, provides that electric light and power plants selling light, power and steam for heat and supplies to the public shall pay a tax of 0.5 per cent. of the gross receipts in excess of $2,500.00 from light, power and steam sold, and 0.5 per cent. of the net profit from supplies sold; that cold storage plants shall pay a tax, depending on their business, ranging from 0.25 per cent. to 0.5 per cent.; that laundries shall pay a tax, depending on their business, ranging from 0.25 per cent. to 0.75 per cent.; that meat markets shall pay a tax, depending on their business, ranging from 0.13 per cent. to 0.25 per cent.; that mining shall pay a tax of one per cent. of the net income in excess of $5,000.00; that telephone companies shall pay a tax of 0.5 per cent. of the gross receipts in excess of $1,500.00; that water works, selling water or power to the public, shall pay a tax of 0.5 per cent. of the gross receipts in excess
26 of $2,500.00; that salteries, except herring, shall pay a tax of $.025 per one hundred pounds on all fish salted or mild-cured, and that during the year 1918 the selling price of salt fish and mild-cured fish was as follows: $18.00 per 200-lb. barrel, making a tax of

0.277 per cent; that salmon canneries shall pay a tax of $.045 per case on kings, and reds or sockeyes, $.025 per case on medium reds, and $.02 per case on all others; that the prices for salmon, per case during the year 1918, were as follows:

Per cs.	4	dz.	Chinook Salmon,	tall,	3.15	dz.	$12.60	tax	4½¢ 0.357%
" "	4	"	Sockeye "	"	3.15	"	12.60	"	4½¢ 0.357%
" "	4	"	Alaska Red "	"	2.35	"	9.40	"	4½¢ 0.478%
" "	4	"	Med. Red Alaska	"	2.25	"	9.00	"	2½¢ 0.278%
" "	4	"	Alaska King Sal.	"	3.00	"	12.00	"	4½¢ 0.375%
" "	4	"	Pink Salmon	"	1.65	"	6.60	"	2¢ 0.303%
" "	4	"	Chum Salmon	"	1.60	"	6.40	"	2¢ 0.351%

the tax ranging from 0.303 per cent. to 0.478 per cent., but averaging a tax of 0.351 per cent, on the industry of canning salmon; whereas during the year 1918 the selling price of fish oil, made from herring in whole or in part, was $35.71 per barrel, which under said act is taxed $2.00 per barrel or 5.60 per cent. on the gross receipts and 113.64 per cent. on the net profits, and the selling price of fertilizer and fish meal made in whole or in part from herring, for the year 1918, was $68.46 per ton, which was taxed $2.00 per ton under said act, or a tax of 2.92 per cent. on the gross receipts and 28.12 per cent. on the net profits; and that although there are other persons and corporations in the said territory who are engaged in the manufacture of fish oil, fish meal and fertilizer from fish, inasmuch as they do not use herring either in whole or in part, no license or other tax whatsoever is assessed against or levied upon them by the territory
27 of Alaska, and that the said business of said other persons and corporations is in all essentials the same as the business of this plaintiff and there are no existing distinctions that differentiate the said business of plaintiff from said business of said other persons and corporations; and that the levying of a license tax on plaintiff's said business, without levying a similar tax on the manufacture of fish oil, fish meal and fertilizer from fish, other than from herring either in whole or in part, is unreasonable, purely arbitrary, discriminatory and for the purpose of compelling plaintiff to cease its said business and industry, and of prohibiting and destroying plaintiff's said business and industry; and that neither plaintiff, which has been engaged in said business and industry for many years, nor any other person, firm or corporation, can or could continue to remain in said business and industry and continue to carry on said manufacture of fish oil, fish meal and fertilizer from herring either in whole or in part, and pay, as required and compelled by said acts, such excessive, exorbitant, extortionate, oppressive, prohibitive, discriminatory and unreasonable tax, and, as hereinbefore stated, if it be required to pay said tax each year, plaintiff will be obliged to suspend its operations and cease from said business and industry.

VIII.

That plaintiff, in order to successfully carry on its said business, is obliged at the commencement of each fishing season to obtain credit upon the pack and product which it expects and intends to put up and manufacture during the season, and it is and has been long prior to the passage of said acts, plaintiff's custom, and it is necessary for plaintiff, to obtain credit for that purpose at the beginning of each operating season, and in order to obtain and maintain such credit and successfully finance plaintiff's business and
28 said pack and output it is necessary and requisite that plaintiff's plant and said pack and output be kept free and clear from all mortgages, liens, and other incumbrances but that Section 5 of said Chapter 76, Alaska Session Laws,1915, provides that all taxes levied or laid or provided for in said Acts, and penalties, fines and interest accrued, are made and declared to be a lien upon the real and personal property of the person, firm or corporation, including plaintiff, liable therefor, paramount and superior to all mortgages, hypothecations, conveyances and assignments and that said Section 5 was not repealed or modified by said Chapter 74, Alaska Session Laws, 1917, but remains in full force and effect, and that said acts of themselves operated as duress upon this plaintiff and obliged and compelled this plaintiff to pay, as hereinafter stated, said license tax of $2.00 per barrel of fish oil manufactured by it from herring in whole or in part, and of $2.00 per ton on fish meal and fertilizer manufactured by it from herring in whole or in part, so levied by said Chapter 74, Alaska Session Laws, 1917, in order that it might continue and remain in business and keep its real and personal property free from the liens provided for by said acts; and if plaintiff had not paid said license taxes, the amount thereof, together with large and unreasonable and excessive penalties, fines and interest, as hereinafter referred to, would under said acts of the said legislature of Alaska, have become a lien upon all real and personal property of plaintiff situate in Alaska, paramount and superior to all mortgages, hypothecations, conveyances and assignments, and that plaintiff would thereby have been prevented from continuing its business and industry and would have had to cease the same, as it could not have obtained credit for and financed its business in the face of such lien and liens.

29 IX.

That in addition to providing for said licenses to be paid by this plaintiff as aforesaid, said Chapter 76, Alaska Session Laws, 1915, and said Chapter 74, Alaska Session Laws, 1917, provide that in addition to a civil remedy, any person, firm or corporation, including plaintiff, violating any of the provisions of said act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of the amount of the tax with ten per cent. added, for which such person, firm or corporation, is liable, and that each month or fraction of a month in which business, including plaintiff's said business, is carried on in violation of the said acts shall be

deemed a separate offense and prosecution therefor may be by information filed by the Attorney General or other authorized legal counsel of the Territory in any court of competent jurisdiction, and upon conviction the court shall enter a judgment for the fine and costs incurred, and such judgment may be enforced as judgments in civil action or by imprisonment at the rate of one day for each $2.00 of such fine and costs; and that said section of said act and its and their provisions, do and did operate as duress upon plaintiff, and compelled and required it to pay, as hereinafter stated, said license tax of $2.00 per barrel of fish oil manufactured by it from herring in whole or in part, and $2.00 per ton of fish meal and fertilizer manufactured by it from herring in whole or in part, in that, if it had failed to pay the same, it would have been guilty of a misdemeanor and punished by a fine of the amount of the tax with ten per cent. added, and for each month or fraction of a month in which it carried on its said business it would have been guilty of a separate offense and subjected to like fines and penalties therefor, and would not lawfully have been permitted to continue to carry on, con-
30 duct and maintain its said business and industry, and that it could not in the face of said provisions carry on its said business without being at all times subjected to becoming financially wrecked and bankrupt in the payment of said fines and penalties which it would have incurred if it had failed to pay said license; and which, with said interest, fines and penalties, would have become a lien paramount and superior to all other liens, upon all its real and personal property in the Territory of Alaska; and that said acts, and said fines and penalties therein provided for violations thereof, are so severe and drastic that plaintiff did not dare fail or refuse to pay them pending such time as would be required to have said acts declared invalid.

X.

That heretofore, to wit, on January 15, 1919, by reason of said force and duress so unlawfully and illegally exercised upon it by defendant and by said Territory of Alaska, and by said acts and laws of said Alaska legislature, plaintiff made a true return and paid under protest, to said defendant as Treasurer for Alaska, the license and tax for the year 1918, computed on the true amount of fish oil, fish meal and fertilizer, from herring either in whole or in part, manufactured and packed by it during the year 1918, that is to say, 2,720 barrels of fish oil at $2.00 per barrel, amounting to $5,440.00, and 645 tons of fish meal at $2.00 per ton, amounting to $1,290.00, making a total of $6,730.00, which this plaintiff on said date paid to said defendant, as such Treasurer as such license tax, under protest and by reason of said duress so exercised upon it, and that at the time of making said payment plaintiff notified said defendant and the Territory of Alaska, and the Territorial Treasurer for Alaska, and each of them knew and have known at all times herein men-
tioned that plaintiff regarded and considered, that said acts of
31 said legislature were null, void, unconstitutional and illegal, and that it was paying and paid said taxes under protest and

because of said duress so exercised upon it, and that it would hold said defendant, said Territory of Alaska and said Territorial Treasurer responsible therefor and for the return and refund theeof, and that plaintiff intended to and would bring suit for the recovery and refunding thereof; that at said time and on January 16, 1919, the said defendant notified plaintiff through its then attorney, that he would hold said moneys so paid, in a special deposit until said acts of said legislature were tested in the courts;

XI.

That heretofore, to-wit, on January 23, 1919, plaintiff demanded from said defendant that he return said sum of $6,730.00 with interest at the rate of eight per cent. per annum from January 15, 1919, to plaintiff, but that defendant has at all times refused and does still refuse, and has entirely failed, to account for, return or refund said sum, with said interest, to plaintiff, and that neither said sum nor said interest has been refunded to plaintiff or to anyone for its use by said defendant, the Territorial Treasurer for Alaska, or the Territory of Alaska, and that by reason of the foregoing facts defendant is indebted to this plaintiff in the sum of, and this plaintiff is entitled to recover from the defendant, $6,730.00 with interest at the rate of eight per cent. per annum from January 15, 1919.

Wherefore, plaintiff prays judgment against the defendant for the sum of $6,730.00 with interest at the rate of eight per cent. per annum from January 15, 1919, and for its costs and disbursements herein incurred and expended.

R. E. ROBERTSON,
Attorney for Plaintiff.

32 STATE OF OREGON,
County of Multnomah, ss:

R. Koehler, being first duly sworn on oath, deposes and says: that he is Vice-President of the within named corporate plaintiff and that he makes this verification on its behalf; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true as he verily believes.

R. KOEHLER.

Subscribed and sworn to before me this 30 day of January, 1919.
[SEAL.] M. MUIR,
Notary Public for the County of Multnomah, State of Oregon, Residing in the City of Portland.

My commission expires 8/4, 1919.

Filed in the District Court, District of Alaska, First Division, Feb. 17, 1919.

J. W. BELL,
Clerk,
By JOHN T. REED,
Deputy.

33 In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1816-A.

ALASKA FISH SALTING & BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

v.

W. G. SMITH, Defendant.

Demurrer.

Comes now the defendant named in the above entitled action and demurs to the complaint of the plaintiff filed herein on the following grounds:

(1) That there is a defect of parties defendant;

(2) That the complaint does not state facts sufficient to constitute a cause of action.

GEORGE B. GRIGSBY,
Attorney for Defendant.

The receipt of a true and correct copy of the within Demurrer acknowledged this 17th day of March, 1919.

R. E. ROBERTSON,
Attorney for Plaintiff.

Filed in the District Court, District of Alaska, First Division, Mar. 19, 1919.

J. W. BELL,
Clerk,
By C. Z. DENNY,
Deputy.

(Endorsed:) Original. No. 1816-A. In the District Court for the District of Alaska, Division Number One, at Juneau, Alaska Fish Salting & By-Products Company, a corporation, Plaintiff vs. W. G. Smith, Defendant. Demurrer. George B. Grigsby, Attorney General, Juneau, Alaska.

34 In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1793-A.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation,

vs.

W. G. SMITH.

Hearing on Demurrer to Complaint.

Now at this time the above entitled cause comes on regularly before the Court upon defendant's demurrer to the amended complaint herein; George B. Grigsby, Attorney General, appearing in support of the demurrer, and R. E. Robertson, Esquire, attorney for plaintiff, in opposition thereto.

Thereupon Mr. Grigsby states that he waives the point in his demurrer as to the defect of parties plaintiff, and thereupon, after hearing the argument of Mr. Grigsby, the matter is continued for further argument until Friday morning, March 28, 1919, at 9:30 o'clock.

Wednesday, March 26, 1919.

Court Journal O, Page 462.

JENNINGS, *District Judge.*

35 In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1816-A.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation,

vs.

W. G. SMITH.

Hearing on Demurrer to Complaint.

Now at this time the above entitled cause comes on regularly before the Court upon defendant's demurrer to the complaint herein; George B. Grigsby, Attorney General, appearing in support of the demurrer, and R. E. Robertson, Esquire, attorney for plaintiff, in opposition thereto.

Thereupon Mr. Grigsby states that he waives the point in his demurrer as to the defect of parties plaintiff, and thereupon, after hearing the argument of Mr. Grigsby, the matter is continued for further argument until Friday morning, March 28, 1919, at 9:30 o'clock.

Wednesday, March 26, 1919.

Court Journal O, Page 462.

JENNINGS, *District Judge.*

36 In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793-A and 1816-A.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation,

vs.

W. G. SMITH.

Hearing on Demurrers, etc.

Now at this time the above numbered and entitled cases come on for further hearing before the Court upon demurrers to the complaints filed in said causes. George B. Grigsby, Esquire, attorney General, appears in support of the demurrers and R. E. Robertson, attorney for plaintiff, in opposition thereto.

Thereupon arguments are resumed and continued until tomorrow morning at nine-thirty o'clock A. M.

Friday, March 28, 1919.

JENNINGS,
District Judge.

Court Journal O, Page 467.

37 In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793-A & 1816-A.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation,

vs.

W. G. SMITH.

Continuation of Hearing on Demurrers, etc.

Now at this time argument is resumed by Mr. Grigsby upon the demurrers to the complaints filed in the above entitled and numbered cases, whereupon the matter is taken under advisement; and on consent of respective counsel, the above two cases are consolidated and considered as one case.

Thereupon, on consent of Mr. Grigsby, plaintiff's attorney is given permission to change the defendant's name from W. G. Smith to Walstein G. Smith.

Saturday, March 29, 1919.

JENNINGS,
District Judge.

Court Journal O, Page 468.

38 In the District Court for the District of Alaska, Division No. One, at Juneau.

Nos. 1793-A—1816-A.

ALASKA FISH SALTING & BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

vs.

W. G. SMITH, Defendant.

Ruling on Demurrers to Complaints.

R. E. Robertson, for plaintiff;
George B. Grigsby, Attorney General, for defendant.

Delivered June 7, 1919.

Filed in the District Court, District of Alaska, First Division, Jun. 7, 1919.

J. W. BELL,
Clerk.

39 JENNINGS, *Judge:*

The gist of the complaints in these cases is:

(1) That plaintiff is, and since 1886 has been, engaged in the business of the manufacture and production of fish oil, fertilizer, fish meal and by-products from herring fish in whole and in part, and has a valuable plant for that purpose; and that said business is useful, legitimate and commendable, but that it is necessary that the same should be conducted on a small margin of profit.

(2) That the Legislature enacted the following Acts, to-wit: Act of May 1, 1913, Session Laws of 1913, Chapter 52, page 107; Act of April 29, 1915, Session Laws 1915, Chapter 76, page 185; Act of May 3, 1917, Session Laws 1917, Chapter 74, page 185; all of which said Acts levy license taxes on the business of fisheries, etc.: That said Acts are void because they amend, alter and modify the fishing laws of the United States, and because they levy an annual tax in excess of one per cent valuation, and because the said taxes are not uniform and are not levied under general laws nor based upon assessment according to actual value of property, and because said Acts deprive the plaintiffs of their property without due process of law, and so are contrary to the 5th and 14th amendments.

The Act of 1917 is said to be void because in addition to the foregoing alleged reasons its object and purpose is "To abolish and prohibit fish oil works using herring in whole or in part" and that object is not expressed in the title, and because the penalty for non-payment of the taxes levied is so severe that the plaintiff would, if the Act be sustained, be financially ruined.

(3) That plaintiff has paid the taxes levied for the years 1917-18 respectively, under duress and protest.

The prayers are that the taxes so paid may be recovered.

The complaints are alike in their essential averments although differing as to the allegations concerning the gross output and net profits of the business for the years 1917-1918, and as to the amounts sought to be recovered.

40 Defendant demurred to the complaint on the grounds that there was a defect of parties and that the complaint did not state facts sufficient to constitute a cause of action. At the argument on the demurrer the objection that there was a defect of parties was expressly waived, as was also any contention that the complaint was insufficient in its allegations of duress or in any particular other than in its allegations as to the unconstitutionality of the tax; so that the only question before the Court at this time is this: Does the complaint state facts sufficient to show that the tax is unconstitutional?

(1) It is assigned and argued that the Acts of 1913-15-17, supra, contravene the Organic Act because, as alleged,

(*a*) They amend, alter and modify the fishing laws of the United States.

The basis for this contention is not apparent. The law of the United States imposing a tax of ten cents per barrel on fish oil works and twenty cents per ton on fertilizer works (section 2569 C. L. Alaska 1913) cannot be said to be a fishing law of the United States,—it is a "tax on the pursuit of a certain line of business." The Territorial statutes in question provide for a license tax, not on fishing, but, on the pursuit of a certain line of business. So far as these statutes are concerned, one may catch and sell all the herring one chooses without liability to pay a tax.

(*b*) Because the Acts levy an annual tax in excess of one per cent valuation; and

(*c*) Because the taxes are not uniform nor under general laws, nor based upon assessment of actual valution. Objections analogous to (*b*) and (*c*) were fully passed upon in the case of the Territory v. Alaska Pacific Fisheries, 5 Alaska, 325, affirmed in 236 Fed. 61. That decision was adverse to plaintiff's contention.

41 (2) The Act of 1917 is further attacked,

(*d*) Because its object and purpose is to abolish and prohibit fish oil works using herring in whole or in part, and that object is not expressed in the title.

The constitutional inhibition is as follows: "No law shall embrace more than one subject, which shall be expressed in its title." (Organic Act, section 8.)

The title of the Act in question is "An Act to amend sections 1 and 2 of Chapter 76, laws of Alaska 1915, entitled 'An act to establish a system of taxation, create revenue, etc.'"

I cannot see that the act in question does anything more than that

which by its title it purposes to do—that is, amend the former act; this amendment is to the effect that taxes are increased on some industries, and some industries (fish oil works among the number) theretofore untaxed are made the subject of taxation.

(*e*) Because "it levies double taxation, to-wit: $2 per barrel on fish oil manufactured from herring, and $2 per ton on fish meal and fertilizer manufactured from herring, while at the same time defendant must pay 10 cents per barrel on fish oil, and 20 cents per ton on fish meal, under sections 259 and 2569 C. L. 1913."

In the case above referred to, to-wit: Territory v. Alaska Pacific Fisheries, 5 Alaska 325, 236 Fed. 52, a like contention was made and was decided adversely, the upper court saying:

"And thus by the Organic Act those general provisions for the protection of the fish which we find in the act of 1906 were kept in force without possibility of alteration, amendment, or repeal by the territorial Legislature, and the specific license tax provided by the act of 1906 was kept in force, but with power transferred to the Legislature to impose, if it should see fit, other and additional license taxes."

42 Other contentions which will be here noticed are

That the Act is confiscatory in that in 1917 the tax amounted to 5.6% of gross receipts, and 113.64% of the net profits, obtained by plaintiff from the manufacture of fish oil; and 2.92% of gross receipts, and 28.12% of net profits, obtained by plaintiff from the manufacture of fish meal and fertilizer; and that

in 1918 the tax on gross and net receipts, respectively, on the above items, respectively, amounted to the following, to-wit: 9.31, 84, 4.5, 8.18.

A tax of ten per cent on gross output is not confiscatory; and the "net profits" is necessarily a question of economy and efficiency of method.

That the penalty for non-payment of the tax is severe as to prohibit a testing of a tax in a court of law.

It will be time enough to determine that question when some attempt is made to collect the penalty. (Flint v. Stone, 220 U. S. 177). Ex-parte Young, 209 U. S. 123, and Cotting v. K. C. Stock Yards, 183 U. S. 79, cited by plaintiff do not apply to a case like this. (Rast v. Van Deman, 240 U. S. 357.)

That the Act is not a revenue measure.

It purports to be a revenue measure, and it levies a tax on a taxable res and the tax is demanded for a lawful public purpose. Moreover, it is alleged in the complaint that said tax was levied * * * "but solely for the purpose of raising revenue and as a revenue measure, and for the further purpose," etc. (Complaint, par. VI.)

That the tax is discriminatory.

The tax bears equally upon all persons engaged in the line of business which is taxed.

43 The main contention of plaintiff is that the Act of 1917 is in contravention of the 5th and 14th Amendments of the

Constitution, in that it results in, and was intended to result in, the deprivation of property without due process of law; that the manufacture of fish oil from other fish than herring is not taxed at all, and that "there are no existing distinctions which differentiate the business of plaintiff from the business of making fish oil out of other fishes than herring"; and that the singling out of plaintiff's business was for the purpose of destroying that business, etc.

By the demurrant the Court is cited to the case of McCray v. United States, 105 U. S. (the oleomargarine case), which reiterates the oft-repeated assertion that "the power to tax is the power to destroy", and the equally frequent assertion that once it be conceded that the taxing power has been exercised, no court can inquire into the motives and purposes of the legislature in enacting the legislation. The Justice who wrote the opinion has this to say in Brushaber v. Union Pac. R. R. 241 U. S., 1-24:

"So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. * * * And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property—that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

The opinion in the McCray case is an exhaustive review of authorities, but I cannot see that it is very definite as to what is a proper test by which can be determined the question as to whether
44 an Act purporting to be a Revenue Act is really and truly a Revenue Act or an Act of Confiscation under the guise of a Revenue Act, unless it be that the whole matter turns on the question as to the "reasonableness" of the classification. If the question cannot be determined by a consideration of the motives and purposes of the individual legislators (and it seems that it cannot—McCray v. U. S. supra, page 61, second paragraph—nor by a consideration of the fact that the tax is oppressive or prohibitive (Ibid, page 60), what is there left by which it may be determined? And yet "one is in danger of losing himself in the terms reasonable and arbitrary." (148 Fed. 525.

In view of the almost omnipotent character of the taxing power one is impelled (by a process of elimination) to the conclusion that when there is no distinction made between members of a class the decisive test lies in the presence or absence of a sufficient basis for classification. That being so, the question in the case at bar is not

difficult of solution, when it is considered how strong a case must be made before a court will declare an Act of the Legislature to be unconstitutional.

Classification.

As throwing a side light on what is not a proper basis for classification, reference might be made to this language of Mr. Justice Brown, in American Sugar Refining Co. v. Louisiana, 179 U. S. 89-92, to-wit:

"Of course, if such discrimination were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes;"

but here again a question is left open by the words "or other considerations having no possible connection with the duties of citizens as tax payers."

45 In the case of Rast v. Van Deman and Lewis, supra, however, the Supreme Court said:

"It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. Chi., Burl. & Quincy R. R. v. McGuire, 219 U. S., 549; German Alliance Ins. Co. v. Kansas, 223 U. S. 389; 413, 414; Price v. Illinois, 238 U. S. 446, 452.

It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare. Eubank v. Richmond, 226, U. S. 137, 142; Sligh v. Kirkwood, 237 U. S. 52, 59. And, we repeat, 'it may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary.' Quong Wing v. Kirkendall, 223 U. S. 59, 62, and the cases cited above.

Of course an element to be considered is the authority of the legislature over the subject matter."

Plaintiff contends that "there are no existing distinctions which differentiate the business of plaintiffs from the business of making fish oil out of other fishes than herring, and that the business of making fish oil and fertilizer out of other fishes than herring is not taxed at all."

Now, not only is it "not inconceivable" that there is any basis for classification, but on the contrary to persons familiar with the fishing industry in Alaska a very probable basis for classification immediately suggests itself, and that is this: While the herring is a

food fish for man, yet so also is the salmon. It is a well-known fact that the salmon feeds largely on the herring (XXIV Encyclopædia Britannica, page 82, 2nd column, middle), and it is so easily conceivable as to be said to be probable that the legislature considered that the using of herring in large quantities for the manufacture of fish oil and fertilizer so depletes the food supply of what the legislature considered the more valuable and desirable
45½ "food for man" fish (that is, the salmon) as to seriously diminish the "run" of the latter. If so, that fact alone would constitute a sufficient basis for classification—240 U. S. 357 supra.

That there is a gross and patent inequality in the amount of the tax levied on this particular line of business as compared with the tax levied on other lines of business the allegations of the complaints if true do not permit of a doubt; but, nevertheless, all persons following this particular line of business are taxed alike, and if it cannot be said that the classification of the lines of business is wanting in a reasonable "basis of classification," and if that consideration be the decisive test, then it cannot be said that the Act is "so arbitrary as to constrain to the conclusion that it was not the exercise of classification but confiscation."

The legislature may itself choose the lines of business upon which it will levy the taxes, and it is not the function of the court to control its direction. (McCray v. U. S. supra.) The Legislature in its selection of objects to be taxed may favor some industries over others. In the case of Quong v. Kirkendall, 223 U. S. 62, the state of Montana laid a prohibitive tax on hand laundries. The "hand laundrymen" objected that they were being "taxed out of business" whereas there was no reasonable "basis for classification" by which their industry could be differentiated from steam laundries. The Court said:

"A state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry."

True, the Court intimated that it had been assigned and successfully maintained that the legislation was "aimed at the Chinese" their ruling might have been different, but if so, in that event, the case would have been one of distinction made on account of color, race, nativity, etc., spoken of in Sugar Refining Co. v. Louisiana, 179 U. S. (supra).

46 It does not appear that the Act in question here is "so arbitrary as to constrain to the conclusion that it was not the exercise of the taxing power but a confiscation of property."

Counsel for plaintiff cites many cases to the effect that where a business is in itself lawful, the law-making power may not abolish that business or discriminate against it. As fairly typical of the cases so cited is the case of Connelly v. Union Sewer Pipe Co., 184 U. S. 541. In that case the exercise of the taxing power was not brought into question but rather a statute of the State of Illinois

providing that the combination of certain enterprises were "bad trusts" and that contracts with them were unenforceable—expressly providing also that the inhibition "shall not apply to agricultural products or live stock in the hands of the producer or raiser." The Court held that such a discrimination could not be sustained. On page 562, however, the Court expressly said:

"A state may, in its wisdom, classify property for purposes of taxation and the exercise of its discretion is not to be questioned in a court of the United States so long as the classification does not evade rights secured by the Constitution of the United States. But different considerations control when the State by legislation seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. * * * It is one thing to exert the power of taxation so as to meet the expenses of government and at the same time indirectly to build up or protect particular interests or industries. It is quite a different thing for the state under its general police power to enter the domain of trade or commerce and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce."

In Nicoll v. Ames, 173 U. S. 509, the Supreme Court says:

"The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive."

ROBERT W. JENNINGS,
Judge.

The demurrers will be sustained.

* * *

47 In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793–A and 1816–A, Consolidated.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

vs.

WALSTEIN G. SMITH, Defendant.

Judgment.

This action having heretofore come on for hearing on March 26, 1919, the plaintiff appearing by its attorney, R. E. Robertson, Esq., and the defendant appearing by its attorney, George B. Grigsby, Esq.; and the said defendant having appeared and demurred to the

amended complaint of the plaintiff in cause No. 1793–A, and the said defendant having also appeared and demurred to the complaint of the plaintiff in cause No. 1816–A; and at said time the said parties, by their said counsel, having orally agreed and stipulated in open court, that said two causes should be consolidated and should thereafter be considered as though both of said actions had been brought in one action, and the defendant, by his counsel, having thereupon in open court expressly waived all contention and objection that plaintiff's said pleadings were insufficient in respect to their allegations of duress or that there was a defect of parties plaintiff or defendant, or that said pleadings were insufficient in any respect other than in their allegations as to the unconstitutionality of the territorial acts, and the taxes levied thereby, involved in said actions, as so consolidated into one action; and thereupon argument having been duly had on said demurrers of said defendant to plaintiff's said pleadings, and said argument having been continued from day to day until March 29, 1919, on which said date the Court took the same under advisement; and thereafter and on June 7, 1919,
48 the Court being fully advised in the premises delivered in open Court his written opinion or "ruling on demurrers to complaints," sustaining said demurrers to plaintiff's said pleadings.

Now, on motion of George B. Grigsby, attorney for the defendant herein:

It is ordered, adjudged and decreed that the defendant's demurrers to plaintiff's said pleadings be, and the same are hereby, sustained; and plaintiff electing to stand on the record,

It is further ordered, adjudged and decreed that plaintiff's amended complaint in said action No. 1793–A, now consolidated with said action No. 1816–A, be and the same is hereby dismissed; and

It is further ordered, adjudged and decreed that plaintiff's complaint in said action No. 1816–A, now consolidated with said action No. 1793–A, be and the same is hereby dismissed; and

It is further ordered, adjudged and decreed that the defendant have and recover of the plaintiff his costs and disbursements herein to be taxed.

Done in open court this 18th day of June, 1919.

ROBERT W. JENNINGS,
District Judge.

To which Judgment and Ruling of the Court, the plaintiff excepts, and its exception is hereby allowed.

ROBERT W. JENNINGS,
District Judge.

O. K.

G. B. GRIGSBY.

Entered Court Journal, No. P- Page 104–5.

Filed in the District Court, District of Alaska, First Division, Jun- 18, 1919.

J. W. BELL,
Clerk.
By JOHN T. REED,
Deputy.

49 In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793–A and 1816–A, Consolidated.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

vs.

WALSTEIN G. SMITH, Defendant.

Assignment of Errors.

Comes now the Alaska Fish Salting and By-Products Company, a corporation, the plaintiff in the above entitled action, and assigns the following errors as having been committed by the Court herein upon which it relies, and will rely, upon its appeal from the judgment made and entered by the above entitled Court on the 16th day of June, 1919, towit:

1. The Court erred in sustaining defendant's demurrer to plaintiff's amended complaint in action No. 1793–A, now consolidated with action No. 1816–A, for the reason that plaintiff's said amended complaint states a cause of action and the said Alaska Territorial Acts, towit: Chapter 52, Alaska Session Laws 1913, approved May 1, 1913, Chapter 76, Alaska Session Laws 1915, approved April 29, 1915, and Chapter 74, Alaska Session Laws 1917, approved May 3, 1917, and particularly Section One, Tenth Sub-section of said Chapter 74, Alaska Session Laws 1917, and the license taxes thereby levied and assessed upon plaintiff's business of manufacturing, from herring in whole or in part, fish oil, fertilizer and fish meal, are contrary to the Constitution of the United States, and particularly to the Fifth and Fourteenth Amendments thereof, and are contrary to the Organic Act of the Territory of Alaska, which is the Act passed by the Congress of the United States on August 24, 1912, and entitled: "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes," and its amendments.

2. The Court erred in dismissing plaintiff's amended complaint in cause No. 1793–A, now consolidated with action No. 1816–A, for the same reason.

3. The Court erred in sustaining defendant's demurrer to plaintiff's complaint in cause No. 1816–A, now consolidated with action

No. 1793–A, for the reason that plaintiff's said complaint states a cause of action and the said Alaska Territorial Acts, to-wit: Chapter 52, Alaska Session Laws 1913, approved May 1, 1913, Chapter 76, Alaska Session Laws 1915, approved April 29, 1915, and Chapter 74, Alaska Session Laws, 1917, approved May 3, 1917, and particularly Section One, Tenth Sub-section of said Chapter 74, Alaska Session Laws 1917, and the license taxes thereby levied and assessed upon plaintiff's business of manufacturing, from herring in whole or in part, fish oil, fertilizer and fish meal, are contrary to the Constitution of the United States, and particularly to the Fifth and Fourteenth Amendments thereof, and are contrary to the Organic Act of the Territory of Alaska, which is the Act passed by the Congress of the United States on August 24, 1912, and entitled: "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes," and its amendments.

4. The Court erred in dismissing plaintiff's complaint in cause No. 1816-A, now consolidated with action No. 1793-A, for the same reason.

5. The Court erred in denying plaintiff's motion for judgment, for the reasons as hereinabove stated.

6. The Court ered in not entering judgment for plaintiff and against defendant for $10,298.00, with interest at 8% from January 14, 1918, for the reasons as hereinabove stated.

7. The Court erred in not entering judgment for plaintiff and against defendant for $6,730.00, with interest at 8% from January 15, 1919, for the reasons as hereinbefore stated.

8. The Court erred in rendering its said judgment against the plaintiff, for the reasons as hereinabove stated.

S. E. ROBERTSON,
Attorney for Plaintiff.

Copy of the within Assignment of Errors received this 17th day of June, 1919.

GEO. B. GRIGSBY,
Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division, Jun. 18, 1919.

J. W. BELL,
Clerk.
By JOHN T. REED,
Deputy.

51 In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793-A and 1816-A, Consolidated.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

vs.

WALSTEIN G. SMITH, Defendant.

Petition for Writ of Error.

To the Honorable Robert W. Jennings, Judge of the District Court for the District of Alaska:

Comes now the Alaska Fish Salting and By-Products Company, plaintiff herein, by its attorney, R. E. Robertson, Esquire, and complaining that in the record and proceedings had in said above entitled cause, and also in the rendition of the Judgment in the said above entitled cause in the District Court for the District of Alaska, Division Number One, against the said above named plaintiff on the 16th day of June, 1919, wherein said Court ordered and adjudged that the defendant's demurrers to plaintiff's amended complaint in said cause No. 1793-A, now consolidated with cause No. 1816-A, and to the plaintiff's complaint in said cause No. 1816-A, now consolidated with said cause No. 1793-A, be sustained, and that the plaintiff's said pleadings be dismissed, and that defendant have judgment against the plaintiff, manifest error hath happened to the great damage of said plaintiff, as will more fully appear from the Assignment of Errors filed herewith.

Wherefore the plaintiff prays for the allowance of a Writ of Error for the correction of the errors complained of, and that a transcript of the record and proceedings, with all things concerning the same, duly authenticated, and such other orders and process as may
52 cause the said errors to be corrected, be sent to the United States Supreme Court.

Dated this 17th day of June, 1919.

R. E. ROBERTSON,
Attorney for Plaintiff.

Order.

Now, on this day, the foregoing Petition coming on regularly for hearing,

It is ordered that the same be and it is hereby allowed.

Done in open court this 18th day of June, 1919.

ROBERT W. JENNINGS,
Judge of District Court for the District of Alaska, Division Number One.

Copy of the foregoing Petition for Writ or Error received this 17th day of June, 1919.

GEO B. GRIGSBY,
Attorney for Defendant.
D. B. C.

Filed in the District Court, District of Alaska, First Division, Jun. 18, 1919.

J. W. BELL,
Clerk.
By JOHN T. REED,
Deputy.

53 Filed June 18, 1919. Docket 4171. U. S. Marshal.

In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793-A and 1816-A, Consolidated.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

vs.

WALSTEIN G. SMITH, Defendant.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Robert W. Jennings, Judge of the District Court for the District of Alaska, Division Number One, Greeting:

Because in the record and proceedings as also in the rendition of the Judgment of a plea in the said District Court, Division Number One thereof, before you, between the Alaska Fish Salting and By-Products Company, a corporation, plaintiff and plaintiff in error, and Walstein G. Smith, defendant and defendant in error, a manifest error hath happened to the great damage of the said plaintiff as set forth and appears by the Petition herein as well as shown by the Assignment of Errors,

We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in that behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record, th Assignment of Errors and all the proceedings aforesaid, together with all things concerning the same, to the Honorable, the Justices of the United States Supreme Court, in the City of Washington, in the District of Columbia, together with this Writ, so as to have the same at the said place and said Court on or before sixty days from the date hereof, that the record and proceedings aforesaid, being

inspected, the said Supreme Court of the United States may
54 cause further to be done therein to correct those errors, *which* of right and according to the laws and customs of the United States, ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the District Court for Alaska this 18th day of June, 1919.

[Seal District Court for the District of Alaska, Div. No. 1.]

JNO. BELL,
Clerk of the District Court for the District of Alaska, Division Number One,
By JOHN T. REED,
Deputy.

Said Writ is by me allowed this 18th day of June, 1919.
ROBERT W. JENNINGS,
Judge of the District Court for the District of Alaska, Division Number One.

Entered Court Journal, No. P, Page 102.

55 UNITED STATES OF AMERICA,
District of Alaska,
Division No. 1, ss:

I, J. M. Tanner, United States Marshal for the First Division District of Alaska, do hereby certify that I received the writ of Error attached hereto on the 18th day of June 1919 at Juneau Alaska, and that I served the same on the 18th day of June 1919 at Juneau Alaska, by delivering to and leaving with the within named defendant W. G. Smith, a copy hereof, certified to by J. W. Bell Clerk of the United States District Court for the First Division District of Alaska.

Dated at Juneau Alaska this 18th day of June 1919
J. M. TANNER,
U. S. Marshal,
By C. H. PASSELLS,
Office Deputy.

Marshal's fees serving writ $3.00.

56 Filed in the District Court, District of Alaska, First Division, Jun. 18, 1919.

J. W. BELL,
Clerk,
By THOS. REED,
Deputy.

57 In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793-A and 1816-A, Consolidated.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

vs.

WALSTEIN G. SMITH, Defendant.

Bond on Writ of Error.

Know all men by these presents, That we, Alaska Fish Salting and By-Products Company, a corporation, as principal, and the United States Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound unto Walstein G. Smith, in the sum of Two Hundred and Fifty ($250.00) Dollars, to be paid to the said Walstein G. Smith, his heirs, executors and administrators, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of June, 1919.

Whereas, lately at the session of the District Court for the District of Alaska, Division Number One, at Juneau, in the above entitled action, Nos. 1793-A and 1816-A, consolidated, pending in said Court wherein the said Alaska Fish Salting and By-Products Company, a corporation, is plaintiff and plaintiff in error, and said Walstein G. Smith is defendant and defendant in error, a judgment was rendered against the said plaintiff on the 16th day of June, 1919, as more fully appears in said judgment, wherein and whereby said Court sustained defendant's demurrers to plaintiff's amended complaint in said action No. 1793-A, and to plaintiff's complaint
58 in said action No. 1816-A, which two actions are now consolidated, and whereas the said plaintiff in error has sued out a Writ of Error to the Honorable, the United States Supreme Court, to reverse the said judgment, and a Citation has been duly issued thereon, directed to the said defendant and defendant in error, and admonishing him to be and appear in the United States Supreme Court, to be holden in the City of Washington, District of Columbia.

Now, the condition of the above obligation is such, that if the said Alaska Fish Salting and By-Products Company, a corporation, shall prosecute said Writ of Error to effect and shall answer all damages

and costs, if it fail to make its plea good, then this obligation to be void; otherwise, to remain in full force and effect.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY,
A CORPORATION,
By R. E. ROBERTSON,
Its Attorney and Agent,
Plaintiff and Plaintiff in Error.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
A CORPORATION,
[SEAL.] By R. E. ROBERTSON,
Its Attorney-in-Fact and Agent,
Surety.

Acknowledged before me this 17th day of June, 1919.
GUY McNAUGHTON,
[SEAL.] *Notary Public for Alaska.*

My commission expires Oct. 24, 1920.

59 UNITED STATES OF AMERICA,
Territory of Alaska, ss:

R. E. Robertson, being first duly sworn on oath, deposes and says: That he is Attorney-in-fact and General Agent for Alaska for the United States Fidelity and Guaranty Company, a corporation, which is incorporated under the laws of the State of Maryland and duly authorized to engage in the writing of surety bonds in the Territory of Alaska; that affiant is informed and believes and, therefore, alleges that said surety company is worth more than the sum of Five Hundred ($500.00) Dollars, exclusive of property exempt from execution, and over and above all its just debts and its liabilities, and is acceptable by the United States as surety on bonds, the penalty of which bonds is many times more than Five Hundred ($500.00) Dollars.

R. E. ROBERTSON.

Subscribed and sworn to before me this 18th day of June, 1919.
GUY McNAUGHTON,
[SEAL.] *Notary Public for Alaska.*

My commission expires Oct. 24th, 1920.

Sufficiency of sureties on the foregoing bond approved this 18th day of June, 1919.

ROBERT W. JENNINGS,
District Judge.

(Endorsed:) Nos. 1793-A and 1816-A. Con. Alaska Fish Salting and By-Products Co, a corp., plaintiff, vs. Walstein C. Smith,

defendant. Bond on Writ of Error. Filed in the District Court, District of Alaska, First Division, June 18, 1919. J. W. Bell, Clerk, by John T. Reed, Deputy. R. E. Robertson, attorney at law, Suite 200, Seward Building, Juneau, Alaska.

60 In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793-A and 1816-A, Consolidated.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation, Plaintiff and Plaintiff in Error,

vs.

WALSTEIN G. SMITH, Defendant and Defendant in Error.

Bill of Exceptions.

Be it remembered, that this matter came regularly on for hearing on the 26th day of March, 1919, on defendant's demurrer to plaintoff's amended complaint in cause No. 1793-A, now consolidated with cause No. 1816-A, and on defendant's demurrer to plaintiff's complaint in cause No. 1816-A, now consolidated with cause No. 1793-A, by which said demurrers defendant demurred to plaintiff's said pleadings on the grounds (1) that there is a defect of parties defendant, and (2) that plaintiff's said pleadings do not state facts sufficient to constitute a cause of action; and thereupon the parties by their respective counsel stipulating in open court that said demurrers should be heard together and that said causes of action should be consolidated, and the defendant by his counsel thereupon expressly waiving all contention and objection that plaintiff's said peladings were insufficient in respect to their allegations of duress or that there was a defect of parties plaintiff or defendant, or that said pleadings were insufficient in any respect other than in their allegations as to the unconstitutionality of the Territorial Acts, and the validity of the taxes levied thereby and involved in said action, and the said matter having been duly argued by respective counsel at hearings continued from day to day until March 29, 1919, at which time the said matter was submitted to the Court, who thereupon took the same under advisement.

And thereafter and on June 7, 1919, the said Court hav-
61 ing rendered his written opinion or "ruling on demurrers to complaints," which is on file in the office of the Clerk of the District Court for the District of Alaska, Division Number One, at Juneau; to which opinion or ruling plaintiff duly excepted and an exception was allowed;

And thereafter and on June 16, 1919, the plaintiff having made and filed his motion for judgment, notwithstanding the said opinion of the court, which motion, in words and figures, is as follows:

"In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793-A and 1816-A, Consolidated.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

vs.

WALSTEIN G. SMITH, Defendant.

Motion.

Comes now the above named plaintiff, by its attorney, and, notwithstanding the written opinion or ruling of the Court herein, respectfully moves the Court that judgment be entered herein in favor of the plaintiff and against the defendant, and particularly that said judgment be entered in favor of the plaintiff and against the defendant, as follows:

1. For the sum of $10,298.00, with interest at the rate of 8% per annum from January 14, 1918.

2. For the sum of $6,730.00, with interest at the rate of 8% per annum from January 15, 1919.

3. For plaintiff's costs and disbursements herein incurred.

This motion is based on the records and files herein.

Respectfully submitted, R. E. ROBERTSON,
Attorney for Plaintiff."

And thereafter and on said day, the Court having denied plaintiff's said motion, as more fully appears by the order of said Court made and entered on said day, which is in words and figures as follows:

"In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793-A and 1816-A, Consolidated.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

vs.

WALSTEIN G. SMITH, Defendant.

Order.

Now, on this day, the above entitled motion coming regu-
62 larly on for hearing, and the Court being fully advised in the premises,

It is ordered that said motion be and the same is hereby denied; to which ruling of the Court the plaintiff excepts and its exception is allowed.

Done in open court this 18th day of June, 1919.

ROBERT W. JENNINGS,
District Judge."

To which ruling of the Court, plaintiff duly excepted and an exception was allowed:

And thereafter and on June 16th, 1919, the plaintiff having elected to stand on the record, the Court made and entered its judgment herein, which in words and figures is as follows:

"In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793-A and 1816-A, Consolidated.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

vs.

WALSTEIN G. SMITH, Defendant.

Judgment.

This action having heretofore come on for hearing on March 26, 1919, the plaintiff appearing by its attorney, R. E. Robertson, Esq., and the defendant appearing by its attorney, George B. Grigsby, Esq.; and the said defendant having appeared and demurred to the amended complaint of the plaintiff in cause No. 1793-A, and the said defendant having also appeared and demurred to the complaint of the plaintiff in cause No. 1816-A; and at said time the said parties, by their said counsel, having orally agreed and stipulated, in open court, that said two causes should be consolidated and should thereafter be considered as though both of said actions had been brought in one action, and the defendant, by his counsel, having thereupon in open court expressly waived all contention and objection that plaintiff's said pleadings were insufficient in respect to their allegations of duress or that there was a defect of parties plaintiff or defendant, or that said pleadings were insufficient in any respect other than in their allegations as to the unconstitutionality of the territorial acts, and the taxes levied thereby, involved in said actions, as so consolidated into one action; and thereupon argument having been duly had on said demurrers of said defendant to plaintiff's said pleadings, and said argument having been continued from day to day until March 29, 1919, on which said date the Court took the same under advisement; and thereafter and on June 7, 1919, the

Court being fully advised in the premises delivered in open court his written opinion or "ruling on demurrers to complaints," sustaining said demurrers to plaintiff's said pleadings.

Now, on motion of George B. Grigsby, attorney for the defendant herein:

It is ordered, adjudged and decreed that the defendant's demurrers to plaintiff's said pleadings be, and the same are hereby, sustained; and the plaintiff electing to stand on the record,

63 It is further ordered, adjudged and decreed that plaintiff's amended complaint in said action No. 1793-A, now consolidated with said action No. 1816-A, be and the same is hereby dismissed; and

It is further ordered, adjudged and decreed that plaintiff's complaint in said action No. 1816-A, now consolidated with said action No. 1793-A, be and the same is hereby dismissed; and

It is further ordered, adjudged and decreed that the defendant have and recover of the plaintiff his costs and disbursements herein to be taxed.

Done in open court this 16th day of June, 1919.

ROBERT W. JENNINGS,
District Judge.

To which ruling and judgment of the Court, plaintiff duly excepted and an exception was allowed.

Order Settling Bill of Exceptions.

And now this matter coming on to be heard on the motion of the plaintiff, by its attorney, requesting that the above and foregoing be signed, settled and allowed as a bill of exceptions and made a part of the record herein,

I, Robert W. Jennings, Judge of the District Court for the District of Alaska, Division Number One, being the Judge before whom said cause was tried and said proceedings had, do hereby sign, settle and allow the same as a full, true and correct bill of exceptions herein, and order that the same be filed and made a part of the record herein; and I do further certify that said Bill of Exceptions was filed, presented, settled and signed within the time allowed by law and the rules and practice of this Court.

Done in open Court this 18th day of June, 1919.

ROBERT W. JENNINGS,
Judge of the District Court.

Entered Court Journal No. P, Page 102.

Copy of the foregoing Bill of Exceptions and Order received June 17, 1919.

GEO. B. GRIGSBY,
Attorney for Defendant.
D. B. C.

Filed in the District Court, District of Alaska, First Division, Jun. 18, 1919.

J. W. BELL,
Clerk,
By JOHN T. REED,
Deputy.

Filed June 18, 1919. Civil Docket 4171. ——— ———, U. S. Marshal.

64 In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793–A and 1816–A, Consolidated.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation, Plaintiff and Plaintiff in Error,

vs.

WALSTEIN G. SMITH, Defendant and Defendant in Error.

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Walstein G. Smith, the above named defendant and defendant in error, and to George B. Grigsby, Esquire, his attorney, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court, to be held in the city of Washington, in the District of Columbia, within sixty days from the date of this citation, pursuant to Writ of Error filed in the office of the Clerk of the District Court for the District of Alaska, Division Number One thereof, at Juneau, wherein the above named Alaska Fish Salting and By-Products Company, a corporation, is plaintiff and plaintiff in error, and you, Walstein G. Smith, are defendant and defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this 18th day of June, A. D. 1919.

ROBERT W. JENNINGS,
Judge of the District Court for the District of Alaska, Division Number One, at Juneau.

Attest:

[District Court for the District of Alaska, Div. No. 1.]

J. W. BELL,
Clerk of the District Court for the
District of Alaska, Division
Number One, at Juneau,
By JOHN T. REED,
Deputy.

65 UNITED STATES OF AMERICA,
District of Alaska,
Division No. 1, ss:

I, J. M. Tanner, United States Marshal for the First Division District of Alaska, do hereby certify that I received the Citation on Writ of Error attached hereto on the 18th day of June, 1919, at Juneau, Alaska, and that I served the same on the 18th day of June, 1919, at Juneau, Alaska, by delivering to and leaving with the within named defendant W. G. Smith a copy hereof, certified to by J. W. Bell Clerk of the United States District Court for the First Division District of Alaska.

Dated at Juneau Alaska this 18th day of June 1919.

J. M. TANNER,
U. S. Marshal,
By C. H. PASSELLS,
Office Deputy.

Marshal's fees, serving writ $3.00.

66 Filed in the District Court, District of Alaska, First Division, Jun- 18, 1919. J. W. Bell, Clerk, By C. Z. Demul, Deputy.

67 In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793-A and 1816-A, Consolidated.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation, Plaintiff and Plaintiff in Error,

vs.

WALSTEIN G. SMITH, Defendant and Defendant in Error.

Prayer for Reversal.

To the Honorable The Supreme Court of the United States:

Now comes the Alaska Fish Salting ant By-Products Company, a corporation, the above named plaintiff and plaintiff in error, by its attorney, R. E. Robertson, Esq., and respectfully prays for a re-

versal of the judgment of the District Court for the District of Alaska, Division Number One, at Juneau, made and entered by said Court on the 16th day of June, 1919, in that certain action pending in said Court, entitled: "Nos. 1793–A and 1816–A, consolidated, Alaska Fish Salting and By-Products Company, a corporation, plaintiff and plaintiff in error, versus Walstein G. Smith, defendant and defendant in error."

R. E. ROBERTSON,
Attorney for Alaska Fish Salting and By-Products Company, a Corporation.

Copy of the foregoing Prayer for Reversal received this 17th day of June, 1919.

GEORGE B. GRIGSBY,
Attorney for Defendant.
D. B. C.

68 Filed in the District Court, District of Alaska, First Division, Jun- 18, 1919. J. W. Bell, Clerk, By John T. Reed, Deputy.

69 In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793–A and 1816–A, Consolidated.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation, Plaintiff and Plaintiff in Error,

vs.

WALSTEIN G. SMITH, Defendant and Defendant in Error.

Praecipe for Transcript on Appeal.

To the Clerk of the District Court for the District of Alaska, Division Number One, Juneau, Alaska.

SIR:

Please prepare the transcript of the record in the above entitled case on Writ of Error and authenticate and certify the following papers, towit:

1. Amended complaint in action No. 1793–A, now consolidated with action No. 1816–A.

2. Stipulation between the counsel for the respective parties in action No. 1793–A, now consolidated with action No. 1816–A, dated March 21, 1919, and filed March 22, 1919.

3. Demurrer, in action No. 1793–A, now consolidated with action No. 1816–A.

4. Complaint in action No. 1816–A, now consolidated with action No. 1793–A.

5. Demurrer in action No. 1816–A, now consolidated with action No. 1793–A.

6. Minute entries of hearings on demurrer, Civil Journal "O", pages 462, 467 and 468.

7. Opinion or "ruling on demurrer to complaints."

8. Judgment.

9. Assignment of Errors.

10. Petition for Writ of Error, and Order allowing same.

11. Writ of Error.

12. Bond on Writ of Error.

70 13. Bill of Exceptions, and Order allowing and settling same.

14. Citation on Writ of Error.

15. Prayer for Reversal.

16. This Præcipe.

When so prepared, authenticated and certified, you will kindly transmit said record to the Clerk of the Honorable the United States Supreme Court, in the City of Washington, District of Columbia.

Dated at Juneau, Alaska, June 18th, 1919.

R. E. ROBERTSON,
Attorney for Plaintiff and Plaintiff in Error.

Copy of the within Præcipe received this 17th day of June, 1919.

GEO. B. GRIGSBY,
Attorney for Defendant.
D. B. C.

71 Filed in the District Court, District of Alaska, First Division, June 18, 1919.

J. W. BELL,
Clerk.
By JOHN T. REED,
Deputy.

72 In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1793-A and 1816-A, Consolidated.

ALASKA FISH SALTING AND BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

vs.

WALSTEIN G. SMITH, Defendant.

Certificate of the Clerk of the District Court to Transcript of Record.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify that the foregoing and hereto attached seventy-one pages of typewritten matter, numbered from one to seventy-one, both numbers inclusive, constitute a full, true and correct copy of the record and the whole thereof, prepared in accordance with the praecipe, of the plaintiff and plaintiff in error, filed herein and made a part hereof, in cases No. 1793-A and No. 1816-A, consolidated into cause No. 1793-A and 1816-A, entitled, "Nos. 1793-A and 1816-A, Consolidated. Alaska Fish Salting and By-Products Company, a corporation, Plaintiff and Plaintiff in Error, vs. Walstein G. Smith, Defendant and Defendant in Error."

I do further certify that the said record is by virtue of the Writ of Error and Citation in this cause, and the Return thereof in accordance therewith.

I do further certify that the said record has been prepared, authenticated and certified to by me in my office, and the cost of preparation, authentication, examination and certificate, amounting to Twenty-nine and 25/100 Dollars, has been paid to me by R. E. Robertson, Esquire, counsel for said plaintiff and plaintiff in error.

73 In Witness Whereof I have hereunto set my hand and affixed the seal of the above entitled Court this 5th day of July, 1919.

[Seal District Court for the District of Alaska, Div. No. 1.]

J. W. BELL,
Clerk of the District Court for the District of Alaska, Number One.

Endorsed on cover: File No. 27,259. Alaska District Court, Division No. 1. Term No. 504. Alaska Fish Salting and By-Products Company, pelintiff in error, vs. Walstein G. Smith. Filed August 21st, 1919. File No. 27,259.

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1793-A.

ALASKA FISH SALTING & BY-PRODUCTS COMPANY, a Corporation, Plaintiff,

vs.

WALSTEIN G. SMITH, Defendant.

Certificate of Correction.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify that, upon examination of the printed Transcript of Record of the above-entitled case, as the same appears in No. 504, October Term, 1919, Supreme Court of the United States, I find that Paragraph VI, of the amended Complaint in the above-entitled action, as the same appears on Pages 4 and 5, of said Record, is not in accord with Paragraph VI, of the original amended Complaint in said action, as the same appears on file in my office, and that this is due to certain inadvertences arising in, or shortly prior to, the preparation of the Transcript of Record in the above-entitled action as certified to by me under date of July 5, 1919; and I hereby further certify that the following is a true, full and correct copy of Paragraph VI, of the amended Complaint in the above-entitled action, as the same appears of record and on file in my office, to wit:

"That said acts of said legislature and particularly that portion of said Chapter 74, Alaska Session Laws 1917, i. e., Section 1, 10th Subsection thereof, levying said license tax upon fish oil, fertilizer and fish meal manufactured from herring either in whole or in part, while ostensibly enacted solely as revenue measures, were in fact enacted for the purpose of prohibiting and restraining, under the guise of a revenue measure, this plaintiff from continuing in its said business and industry, and to abolish plaintiff's said business and to confiscate its property; and that said acts and particularly said sections thereof imposing said tax on fish oil, fertilizer and fish meal manufactured from herring in whole or in part will not produce any revenue for the reason that said tax is so exorbitant, unfair, unreasonable, extortionate, confiscatory and prohibitive that, if said acts and particularly said sections thereof be annually enforced, it will entirely prohibit plaintiff and all others from engaging in the manufacture of fish oil, fertilizer and fish meal from herring either in whole or in part; and that neither said Chapter 74, Alaska Session Laws, 1917, Chapter 76, Alaska Session Laws, 1915, nor Chapter 52, Alaska Session Laws, 1913, provides any regulation whatsoever for the business of manufacturing fish oil, fish meal and fer-

tilizer from herring either in whole or in part, in the Terri
Alaska, and that said tax is greatly in excess of the reasonal
necessary cost of any license or regulation whatsoever tha
reasonably be required to be exercised over said business or in
and that the cost of regulating and supervising, and of issu
censes for, said business and industry is and would be and h
no greater than that of any of the other businesses or indust
which licenses are provided in said acts, but that plaintif
industry is arbitrarily, capriciously and unjustly taxed many
more than, i. e., a percentage many times larger than that
on, any other business in the Territory, and that said Territo
and had, no authority or power under its police power, eith
plied or otherwise, to impose said tax of $2.00 per barrel on
manufactured from herring either in whole or in part, or $2
ton on fertilizer and fish meal, manufactured from herring
in whole or in part, as a police or other regulation on said b
and industry; and that as a matter of fact no regulation or
supervision whatsoever over said business or industry is requ
needed or furnished therefor or thereto by said Territory;"

In witness whereof, I have hereunto set my hand and affi
seal of the District Court for the District of Alaska, this 5th
March, 1920.

[Seal District Court for the District of Alaska, Div. No.

J. W. BELL,
Clerk of the District C

[Endorsed.]

File No. 27,259. Supreme Court U. S., October Term
Term No. 504. Alaska Fish Salting & By-Products Co.,
Error, vs. Walstein G. Smith. Certificate of Clerk of U. S.
Court as to correction of transcript of record. Filed March 17

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In the

Supreme Court of the United States

OCTOBER TERM, 1919

NO. 504

ALASKA FISH SALTING & BY-PRODUCTS COMPANY,

Plaintiffs in Error,

vs.

WALSTEIN G. SMITH,

Defendant in Error.

ERRATA
IN
BRIEF OF PLAINTIFF IN ERROR

1. p. 9, 5th line from bottom, word "the" should be "due."
2. p. 12, 7th and 8th lines from bottom, word "permissable" should be "permissible."
3. p. 15, 1st line, word "legilation" should be "legislation."
4. p. 16, 8th line from bottom, word "that" should be "the."
5. p. 21, bottom line, word "concuring" should be "concurring."
6. p. 22, 20th line from top, word "Allgever" should be "Allgeyer."
7. p. 27, 4th line from bottom, word "Short" should be "Shore."
8. p. 28, 1st line, word "Short" should be "Shore."
9. p. 58, 12th line from top, words "one tenth" should be "one ninth."
10. p. 65, 7th and 8th lines, the words "the promight have power to do in its suppression" should be stricken.
11. p. 83, 21st line from top, the words "28.18%" should be "28.12%."
12. p. 85, 4th line from top, the word "bsis" should be "basis."

In the

Supreme Court of the United States

OCTOBER TERM, 1919

NO. 504

ALASKA FISH SALTING & BY-PRODUCTS COMPANY,

Plaintiff-in-Error,

vs.

WALSTEIN G. SMITH,

Defendant-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR

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In the

Supreme Court of the United States

OCTOBER TERM, 1919

NO. 504

ALASKA FISH SALTING & BY-PRODUCTS COMPANY,

Plaintiff-in-Error,

vs.

WALSTEIN G. SMITH,

Defendant-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR

STATEMENT OF THE CASE

This action is brought here on Writ of Error from a judgment of the District Court for the District of Alaska, Division Number One, dismissing the action of the plaintiff-in-error, who is hereinafter referred to as the plaintiff, against the defendant-in-error, who is hereinafter referred to as the defendant, to recover moneys paid by way of taxes by the plaintiff to the defendant as treasurer

of the Territory of Alaska for the tax years 1917 and 1918 under Chapter 74, Alaska Session Laws, 1917, enacted by the Alaska Territorial Legislature.

First suit: There were originally two actions: one for the 1917 taxes brought in 1918, being No. 1793-A of the District Court for the District of Alaska, Division Number One, in which an amended complaint was filed under stipulation on March 22, 1919 (Record, p. 10), to recover the tax of $2.00 per barrel on 4,112 barrels of fish oil, amounting to $8,224.00, and the tax of $2.00 per ton on 1,037 tons of fish meal, amounting to $2,074.00, making an aggregate sum of $10,298.00 for which judgment was asked, together with interest thereon at 8 per cent. per annum from January 14, 1918. (Record, pp. 1 to 11, Certificate of Correction, pp. 1 and 2.)

Second suit: This suit for the 1918 taxes was filed on February 17, 1919, being No. 1816-A of said Court, to recover the tax of $2.00 per barrel on 2,720 barrels of fish oil, amounting to $5,440.00, and the tax of $2.00 per ton on 645 tons of fish meal, amounting to $1,290.00, making an aggregate sum of $6,730.00 for which judgment was asked, together with interest thereon at 8 per cent. per annum from January 15, 1919. (Record, pp. 12 to 20.)

The pleadings allege that plaintiff is engaged in the fishing business and industry, and particularly in the manufacture and production of fish oil,

fertilizer and fish meal and products from herring fish either in whole or in part, at and in the vicinity of Killisnoo, in the Territory of Alaska, and that it and its predecessors in interest have been continuously engaged in said business at said place since 1886; that in order to successfully carry on said business and industry plaintiff and its predecessors in interest, at all times since 1886, have maintained and constructed, and plaintiff does now maintain a large and valuable plant consisting of docks, warehouses, storehouses, factory and other appurtenances and buildings at said place; that said business and industry is a useful, legitimate and commendable business and industry and is of use and value to the economic, industrial and commercial welfare of the Territory of Alaska and the United States of America, in that, it produces, among other things, fish oil, fish meal, fertilizer, glycerine, salt fish and by-products; that said business is necessarily conducted on a close and narrow margin of profits; that it is impossible to carry on, conduct and maintain said business and industry if plaintiff be required to pay the taxes in question (Record, pp. 1, 2, 12 and 13); that it is necessary to use herring fish in said business (Record, pp. 4 and 15); that no other person can or could continue to remain in said business and industry and continue to carry on said manufacture of fish oil, fish meal and fertilizer from herring in whole or in part and pay, as required and com-

pelled by said legislation, said taxes, and, if plaintiff be required to pay them, then it will be obliged to suspend its operations and cease from said business (Record, pp. 7 and 17.); and that that is the object sought to be attained by said legislation under the guise of a revenue measure. (Record, pp. 5 and 16.)

The pleadings further allege that Chapter 52, Alaska Session Laws, 1913, and Chapter 76, Alaska Session Laws, 1915, which is amendatory of the 1913 act, and Chapter 74, Alaska Session Laws, 1917, which is amendatory of the 1915 act, and particularly Section 1, 10th subsection, of the 1917 act, were, illegally and unlawfully, enacted by the Alaska Territorial Legislature, ostensibly solely as a revenue measure, but, in fact, for the purpose of prohibiting and restraining, under a guise of a revenue measure, plaintiff from continuing in its said business and industry, and to abolish plaintiff's said business and to confiscate its property, and that said law and section will not produce any revenue for the reason that said tax is so exorbitant, unfair, unreasonable, extortionate, confiscatory and prohibitive that, if enforced, it will entirely prohibit plaintiff and all others from engaging in the manufacture of fish oil, fertilizer and fish meal from herring either in whole or in part (Record, p. 15; Certificate of Correction, p. 1.); that each of said Session Laws are unconstitutional and void because each of them attempts to and does amend,

alter, and modify the fishing laws of the United States and laws of the United States providing for taxes on business and trade in Alaska, passed by Congress, and in force prior to and at the time of the passage of the Alaska Organic Act (38 Stat., 616), and that Chapter 74, Alaska Session Laws, 1917, is contrary to the provisions of that Organic Act because it attempts to and does levy an annual tax, upon plaintiff's property, in the Territory of Alaska, for Territorial purposes, in excess of one per centum of any valuation that might or could be lawfully fixed upon plaintiff's said property, as a basis for such assessment thereof, without making any provision for such assessment; that said taxes are not uniform upon the same class of subjects and are not levied and collected under general laws, nor are they based upon an assessment according to the actual value of plaintiff's property on which they are fixed or levied; that plaintiff and others similarly situated are deprived of their property without due process of law and are denied the equal protection of the law guaranteed by the Constitution of the United States, and particularly the 5th and 14th Amendments thereof (Record, pp. 2, 3, 13 and 14); that said taxes are excessive, exorbitant, extortionate, oppressive, prohibitive, confiscatory, discriminatory and unreasonable, and amounted on fish oil, in 1917, to 9.31 per cent. on the gross receipts and 84 per cent. on the net profits, and, in 1918, to

5.60 per cent. on the gross receipts and 113.64 per cent. on the net profits, and on fish meal, in 1917, to 4.60 per cent. on the gross receipts and 8.18 per cent. on the net profits and, in 1918, to 2.92 per cent. on the gross receipts and 28.12 per cent. on the net profits and that the greatest tax exacted from any other industry was 1 per cent. on the net profits, but in that case an exemption of $5,000.00 was first allowed; and, as a matter of fact, although there are other persons and corporations in the said territory who are engaged in the manufacture of fish oil, fish meal and fertilizer from fish, inasmuch as they do not use herring either in whole or in part, no license or other tax whatsoever is assessed against or levied upon them by the Territory, and that the said business of said other persons and corporations is in all essentials the same as the business of plaintiff and there are no existing distinctions that differentiate the said business of plaintiff from said business of said other persons (Record, pp. 5, 6, 16 and 17); that none of said Territorial acts provide for any regulation of plaintiff's business and that said tax is greatly in excess of the reasonable and necessary costs of any license or regulation whatsoever that could be reasonably required to be exercised over said business; and that the cost of regulating and supervising, and of issuing licenses for said business is, would be and has been no greater than that of any of the other businesses or industries for

which licenses are provided in said act, but that plaintiff's industry is arbitrarily, capriciously and unjustly taxed many times more than, namely, a percentage many times larger than that levied on any other business in the Territory, and that the Territory had no authority to impose said tax as a police or other regulation; and that, as a matter of fact, no regulation or police supervision whatsoever over said business is required, needed, or furnished therefor or thereto by said Territory (Record, pp. 5, 15, and 16; Certificate of Correction. p. 2.).

The pleadings also alleged other facts as to duress and the onerousness of the fines, penalties, and liens imposed for delinquency in payment of the taxes, but inasmuch as this point was waived by the demurrant when the demurrers were argued, we do not set them forth. (Record, pp. 25 and 31.)

The defendant, who is the treasurer of and for the Territory of Alaska (Record, pp. 2 and 12), appeared by his attorney, The Attorney General for the Territory, and filed a demurrer to the complaint in each case—(plaintiff by stipulation amended its complaint in the first suit, and the defendant's demurrer by the same stipulation was considered as going to the amended complaint [Record, p. 10]—on the grounds that the complaint did not state facts sufficient to constitute a cause of action against the defendant and that there was a defect of parties defendant. (Record, pp. 11

and 21.)

The demurrers in the two actions came on for hearing together and the two cases were consolidated into and considered as one case (Record, pp. 23), and "at the argument on the demurrer the objection that there was a defect of parties was expressly waived, as was also any contention that the complaint was insufficient in its allegations of duress or in any particular other than in its allegations as to the unconstitutionality of the tax." (Record, pp. 25 and 31.)

The Trial Court took the matter under advisement and thereafter rendered its written opinion holding that the Territorial legislation and the taxes were constitutional and valid (Record, p. 24); thereafter plaintiff filed its motion for judgment against the defendant notwithstanding said opinion or ruling (Record, p. 40), which the Court overruled (Record, pp. 40 and 41), and the plaintiff refusing to plead further the Court thereupon entered judgment against the plaintiff and in favor of the defendant (Record, pp. 30 and 31), from which judgment the plaintiff has prosecuted this Writ to this Court. (Record, p. 43.)

Hence, the sole question to be considered, as stated by the learned Trial Court, is: "Does the complaint state facts sufficient to show that the tax is unconstitutional." (Opinion, Trial Court, Record, p. 25; judgment, Record, pp. 31 and 41.)

This question, however, has two phases: 1st,

whether the Territorial legislation and the taxes imposed thereby violate the provisions of the Federal Constitution; and, 2nd, whether they violate the provisions of the Alaska Organic Act (38 Stat., 616.) (Record, pp. 2, 3, 13 and 14.)

SPECIFICATION OF ERRORS.

While there are eight formal Assignments of Error, based on the Trial Court's sustaining the demurrers, dismissing the complaints, denying plaintiff's motion for judgment, and rendering judgment against instead of in favor of plaintiff (Record, pp. 32 and 33), inasmuch as each error resulted from the Trial Court's upholding the constitutionality and validity of the Territorial legislation and the taxes imposed thereby, each assignment is predicated upon the same contention, i. e.:

First: That the Territorial legislation and the taxes imposed thereby, particularly in their application to and direct effect on plaintiff, its business and property, contravene and violate the Constitution of the United States, and particularly the Fifth and Fourteenth Amendments thereof, because plaintiff is denied the equal protection of the laws, and is deprived of its liberty and property without the process of law, and its property is, in effect, taken for public use, without compensation in that, viz.:

(a) The legislative classification of plaintiff's business or industry is so plainly arbitrary

and unreasonable as to constitute class legislation, and that, whereas an unreasonable, confiscatory and prohibitive tax is levied on plaintiff's property, no such tax is laid on other businesses or industries, not even on those which in all essentials are in no wise to be differentiated from plaintiff's business; and

(b) The legislation is manifestly not only a clear abuse of the Territory's legislative authority to a degree such as to plainly indicate more than merely the abuse of a delegated power, but also the exercise of a power not conferred to the extent of an actual usurpation of the reserved authority of Congress, and it accomplishes, by means of an intentionally arbitrary and confiscatory exaction, laid under the guise of a tax, the unauthorized destruction and confiscation of a lawful pursuit, which accomplishment is the real legislative object although disguised as a revenue producing measure; and

(c) The legislation is a clear, arbitrary discrimination against the manufacture of fish oil and fish meal, from herring in whole or in part, although there is no reasonable distinction between that business and other businesses in all essentials similar thereto carried on in the Territory upon which no tax whatsoever is laid, and regardless of the fact that said busines is not one that affects, inherently or otherwise, the public health, morals or welfare, but is a legitimate, useful and com-

mendable business, and one which the Territorial legislature has no authority to prohibit even though it conceived that to do so were for the public good; and

(d) The legislation, if deemed to be a police regulation, makes a charge for such regulation or supervision far beyond any reasonable charge that could possibly be made therefor, and many times in excess of any possible expense therefor, and is many times larger than the charge made on any other business, even of the same class, although the cost thereof to the Territory in one instance is no greater than in the other; but that said legislation provides no actual supervision over, nor does the Territory furnish any supervision of, the business of manufacturing fish oil and fish meal, from herring in whole or in part, and, furthermore, the police supervision and control of the fisheries of Alaska is reserved by Congress in itself and, hence, the Territory can neither directly nor through the guise of a revenue producing, but in fact a revenue non-producing, measure prohibit plaintiff's business; and

(e) The legislation is extortionate, unfair and prohibitive, and, in one instance, so confiscatory as to result in a tax of 113.64 per cent. on the net profits for the year, or 13.6 per cent. more than what the net profits amounted to, thereby in effect resulting in the taking of private property for public use, without compensation.

Second: That the legislation and the taxes imposed thereby violate the Alaska Organic Act (38 Stat., 616), in the same respects as they contravene the Federal Constitution, because legislation enacted under the Organic Act must not be inconsistent with the Constitution of the United States.

Third: That the Territorial legislation and the taxes imposed thereby, further contravene and violate the Alaska Organic Act, in that, viz.:

(a) The taxes imposed thereby are not uniform on the same class of subjects, that is to say, said taxes are neither uniform on all occupations or businesses, nor are they uniform on all businesses of the same class, because no tax whatsoever is laid on other businesses which are similar in all essentials to plaintiff's business and in no wise to be differentiated therefrom, and, furthermore, that no such arbitrary, confiscatory and prohibitive tax as is laid on plaintiff's business is laid on any other business whatsoever; and

(b) The taxes imposed on plaintiff's property exceed one per centum of the actual value thereof, although the maximum per cent permissable for Territorial purposes is one per centum; and

(c) The taxes imposed actually are levied and fall upon plaintiff's property, but they are not assessed on the actual value of that property, nor are they levied under an assessment based upon the actual value of the property, but they are purely arbitrary impositions without regard to the value

of the property on which they fall and in utter violation of the constitutional limitations of the Alaska Organic Act.

BRIEF OF THE ARGUMENT.

I. The allegations of the amended complaint in the 1917 tax case and of the complaint in the 1918 tax case must be taken as true, because the case was decided upon demurrer.

II. The Constitution of the United States is in force and effect in the Territory of Alaska, and local legislation in violation thereof is void.

III. It is the right, even the solemn duty, of the judiciary to consider the real nature and effect of legislation purporting to deprive citizens of rights secured by the fundamental law of the land.

IV. The Constitution of the United States guarantees citizens the right and privilege to pursue a lawful business, and the tax which may be imposed upon the right to engage in an ordinary, useful, harmless business is not free from judicial control.

V. Corporations are citizens within the protection of the Fourteenth Amendment according them the right and privilege to pursue lawful occupations, and are within the protection afforded by the Fifth Amendment that no person shall be deprived of life, liberty, or property, without due process of law.

VI. The source of the legislative authority

of the Alaska Territorial Legislature is to be found in the Congressional Act of August 24, 1912 (38 Stat., 616), and that Act delegates only a limited authority to the Territorial Legislature, reserving therefrom the authority to amend, modify, alter or repeal the fish laws of the United States applicable to Alaska, of which the Act of June 26, 1906 (34 Stat., 478), is one, and the laws of the United States providing for taxes on business and trade, being the Act of June 6, 1900 (31 Stat., 321).

VII. The Territorial legislation, Chapter 52, Alaska Session Laws, 1913, Chapter 76, Alaska Session Laws, 1915, Chapter 74, Alaska Session Laws, 1917, and particularly Section 1, 10th subsection of the latter, impose a grossly and patently inequal and unfair tax on plaintiff's fishing business of manufacturing fish oil and fish meal, from herring in whole or in part, as compared to the tax levied on any other line of business.

VIII. The Territorial legislation and the taxes imposed by it are in violation of the Federal Constitution, and the Legislature has plainly abused its taxing power by exercising it, not for revenue, but for the purpose of destroying rights and privileges secured to plaintiff by the fundamental law of the land, and, even though there may be a seeming exercise of the taxing power, as a matter of fact the taxes are so arbitrary as to be a confiscation of property and not a lawful exertion of taxation.

IX. The legilation and the taxes thereby imposed are in violation of the "equal protection of the law" and "due process of law" clauses of the Fourteenth Amendment and of the "taking of property without compensation" and "due process of law" clauses of the Fifth Amendment, and are so unreasonable, arbitrary, confiscatory, discriminatory and prohibitory that not only is plaintiff denied the equal protection of the laws and deprived of its property without due process of law, but its lawful business, specifically protected by Congress, is prohibited, and, whereas other business similar in all essentials and which cannot be differentiated from it are considered praiseworthy and required to pay no tax, plaintiff is not only subjected to a prohibitory and confiscatory tax but is subjected to stringent fines and penalties for nonpayment thereof.

X. A classification cannot be sustained which is based upon a police regulation where the object sought to be accomplished is ostensibly the raising of revenue and, where to sustain it, would be equivalent to declaring it legal upon a basis and for a reason that does not exist in fact.

XI. A classification, regardless of whether reasonable or logical, cannot be sustained where it is made for the purpose of prohibiting a business, for the prohibition of which there is an absolute want of authority; and such classification is void.

XII. The want of power of the Territorial

Legislature to prohibit plaintiff from conducting its lawful business does not interfere with the police power of the Territory because that power must be exercised subservient to the Constitution.

XIII. A charge imposed for police supervision must bear a relation to the expense of the supervision afforded; otherwise, it is not constitutional.

XIV. The Territorial legislation and the taxes imposed thereby being violative of the Federal Constitution, it follows that they are violative of the Alaska Organic Act (38 Stat., 616).

XV. The Territorial legislation and the taxes imposed thereby are also contrary to the Alaska Organic Act because their effect is to amend, modify, alter and repeal the Congressional Acts of June 6, 1900 (31 Stat., 321), and June 26, 1906 (34 Stat., 478), and Congress has specifically reserved that power from the Territory.

XVI. The Territorial legislation and the taxes imposed thereby are also contrary to the Alaska Organic Act because they are not uniform upon the same class of subjects; that assessments are not according to actual value, in fact no assessments were made based upon the actual value; and the taxes, although levied for Territorial purposes, are in excess of one per centum per annum of any possible valuation which could be lawfully assessd upon the aeutal value of the property on which they fall.

ARGUMENT.

I.

THE ALLEGATIONS OF THE COMPLAINT MUST BE TAKEN AS TRUE BECAUSE THE CASE WAS DECIDED UPON DEMURRER.

The decision of the lower court was decided upon the demurrer to the amended complaint in cause No. 1793-A relating to the 1917 taxes (Record, pp. 10, 11, and 22), and upon the demurrer to the complaint in cause No. 1816-A relating to the 1918 taxes (Record, pp. 21 and 22), and on the ground that these complaints did not state facts sufficient to show the unconstitutionality of the taxes. (Record, pp. 25, 30 and 31.) The allegations of those pleadings are therefore to be taken as true.

Mr. Justice Day, speaking for this Court, in Dobbins v. Los Angeles, said:

> "As this case was decided upon the demurrer to the complaint, the allegations thereof must be taken as true."
>
> *Dobbins v. Los Angeles*, 195 U. S. 223, 234, 49 L. ed. 169, 194;

See also:

> *American School v. McAnnualty*, 187 U. S. 94, 103, 47 L. ed. 90, 94, 23 Sup. Ct. Rep. 33;
>
> *St. Louis v. Knapp, S. & Co.*, 104 U. S. 658, 661, 26 L. ed. 883, 884.

II.

THE CONSTITUTION OF THE UNITED STATES IS IN FORCE AND EFFECT IN THE TERRITORY OF ALASKA, AND LOCAL LEGISLATION IN VIOLATION OF THE CONSTITUTION IS VOID.

Congress took particular pains to emphasize that Territorial legislation should be in accord with the Constitution, first, by providing in Section 3 of the Organic Act of August 24, 1912, 38 Stat., 616, that "the Constitution of the United States * * * shall have the same force and effect within the said Territory, as elsewhere in the United States," and, later, by inserting in Section 8 of the same act, that "the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

Moreover, Section 1891 of the Revised Statutes provides that:

> "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."

This Court, in Rasmussen v. United States, had directly before it the question whether an act depriving persons accused of misdemeanor in

Alaska of a right to trial by a common-law jury, was repugnant to the Constitution, and held:

> "As it conclusively results from the foregoing considerations that the 6th Amendment to the Constitution was applicable to Alaska, and as, of course, being applicable, it was controlling upon Congress in legislating for Alaska, it follows that the provision of the Act of Congress under consideration, depriving persons accused of a right to trial by a common-law jury, was repugnant to the Constitution and void."
>
> *Rasmussen v. United States*, 197 U. S. 516, 528, 49 L. ed. 862, 867.

See also:

Binns v. United States, 194 U. S. 491.

Hence, if Congressional legislation pertaining to Alaska is void because contrary to the Constitution, it must follow that legislation, enacted by a legislature dependent upon Congress for its legislative authority must also be void if violative of Constitutional guarantees.

III.

IT IS THE DUTY OF THE JUDICIARY TO CONSIDER THE REAL NATURE AND EFFECT OF LEGISLATION PURPORTING TO DEPRIVE CITIZENS OF RIGHTS SECURED BY THE FUNDAMENTAL LAW OF THE LAND.

The fact that the license taxes in question are imposed by a legislative act does not operate to

prevent this Court from considering them with a view of ascertaining whether or not that act denies plaintiff the equal protection of the laws or deprives it of some other constitutional guaranty. On the contrary, as this Court has said, it is not only the right, but the duty of the judiciary to consider the real nature and effect of things, regardless of the language or verbiage used by the legislature.

In speaking for this Court, in Mugler v. Kansas, 123 U. S. 623, 661, Mr. Justice Harlan said:

> "The Courts are not bound by mere forms, nor are they to be misled by mere pretence. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Again this Court said, speaking by Mr. Justice Holmes:

> "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

Galveston &c. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037;

This doctrine has also been announced by this Court in many other cases, viz.:

Austin v. Tennessee, 179 U. S. 343, 344, 45 L. ed. 224, 21 Sup. Ct. Rep. 132.

Choctaw &c. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 235, 237;

Atchison &c. R. Co. v. Matthews, 174 U. S. 105;

Nicol v. Ames, 173 U. S. 509, 515;

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169;

Lawton v. Steele, 152 U. S. 133, 137;

Tanner v. Little, 240 U. S. 369, 60 L. ed. 691;

Postal Tel. Co. v. Taylor, 192 U. S. 64, 72, 73;

IV.

THE CONSTITUTION OF THE UNITED STATES GUARANTEES CITIZENS THE RIGHT AND PRIVILEGE TO PURSUE A LAWFUL BUSINESS, AND THE TAX WHICH MAY BE IMPOSED UPON THE RIGHT TO ENGAGE IN AN ORDINARY, USEFUL, HARMLESS BUSINESS IS NOT FREE FROM JUDICIAL CONTROL.

It is a fundamental principle of constitutional law that a citizen has the right and privilege to carry on a lawful business.

Mr. Justice Field, in his concuring opinion, in

Butchers Union, &c., Co. v. Crescent City &c., Co., clearly announced that principle.

> "The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves and have been followed in all communities from time immemorial must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."
>
> *Butchers' Union Slaughterhouse and Live Stock Landing Co. v. Crescent City Live Stock and Slaughterhouse Co.*, 11 U. S. 746, 757, 4 Sup. Ct. Rep. 652, 26 L. ed. 585, 591.

In the later case of Allgever v. Louisiania, 165 U. S. 578, 41 L. ed. 832, Mr. Justice Peckham said:

> "The liberty mentioned in that amendment (referring to the 14th Amendment of the Federal Constitution) means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

See also:

Powell v. Pennsylvania, 127 U. S. 657, 658, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992;

Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 1343;

Bell's Gap R. Co. v. Pennsylvania, 123 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 431;

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431;

Cotting v. K. C. Stock Yards Co., 183 U. S. 79, 81, 46 L. ed. 92, 22 Sup. Ct. Rep. 30;

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18;

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255;

Halter vs. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 Sup. Ct. Rep. 419, 10 Ann. Cas. 625;

Holden v. Hardy, 169 U. S. 366, 390, 42 L. ed. 780, 18 Sup. Ct. Rep. 383;

Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 14 Sup. Ct. Rep. 499;

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273;

Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 925;

Booth v. Illinois, 184 U. S. 425, 428, 46 L. ed. 623, 22 Sup. Ct. Rep. 425;

W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 468, 45 L. ed. 619, 626;

House v. Mayes, 219 U. S. 270, 281, 55 L. ed. 213, 217, 31 Sup. Ct. Rep. 234;

Otis v. Parker, 187 U. S. 606, 608, 47 L. ed. 323, 23 Sup. Ct. Rep. 821.

New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, 676, 37 Sup. Ct. Rep. 247, L. R. A. 1917D 1;

Frisbie v. United States, 157 U. S. 160, 165, 166, 39 L. ed. 637, 659.

Murphy v. California, 225 U. S. 623, 628, 629, 56 L. ed. 1229, 1232, 32 Sup. Ct. Rep. 69, 41 L. R. A. (N. S.) 153;

Smith v. Texas, 233 U. S. 630, 636, 58 L. ed. 1129, 1132, 34 Sup. Ct. Rep. 651, L. R. A. 1915D 677;

Austin v. Tennessee, 179 U. S. 343, 361, 45 L. ed. 224, 233, 21 Sup. Ct. Rep. 132;

Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 696;

Patterson v. Bark Eudora, 190 U. S. 169, 173, 47 L. ed. 1002;

Reiman v. Little Rock, 237 U. S. 171, 179, 59 L. ed. 900, 904, 35 Sup. Ct. Rep. 511;

And, as said by this Court, speaking through Mr. Justice Brown:

> "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations."

Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499, 501.

State courts have held, and this is the rule in Kentucky, that there is a distinction between raising revenue by a license tax on occupations and an ad valorem tax, and, that while the latter is within the discretion of the legislature within constitutional or statutory limits, the former is not free from judicial control.

> "In that case" (referring to Hagar v. Walker, 128 Ky. 1, 107 S. W. 254, 15 L. R. A. (N. S.) 199, 203) "the rule to which we have just adverted is fully recognized, but it is further held that such freedom is not given in the exercise of the power to levy license taxes upon occupations, the court saying: 'But this unlimited freedom from judicial control does not extend to taxes imposed upon trades, occupations, or professions. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431. And the courts, when the question comes to them, have the undisputed right to determine whether or not a legislative act is in violation of the Constitution, although its purpose may be the raising of revenue. Thierman Co. v. Com., 123 Ky. 740, 97 S. W. 366; Bagland v. Anderson, 125 Ky. 141, 128 Am. St. Rep. 242, 100 S. W. 865.'"

Salisbury v. Equitable Purchasing Co., 177 Ky. 348, 197 S. W. 813, L. R. A. 1918A, 1114, 1116.

And in speaking for the Kansas Supreme Court, Mr. Justice Brewer, later of this Court, indicated, in Fretwell v. Troy, 18 Kan. 275, that in his opinion it was not true "that a city having authority to collect revenue by license may impose any sum, however large, as license, and thus, in effect, destroy certain kinds of business."

The Alaska Territorial Legislature, acting as it does under delegated power, is, we submit, in possession of similar legislative powers to those delegated to a municipality under statute, and, unless it has express or implied authority therefor, cannot suppress a legitimate business any more than a municipality could do so without such authority.

Or, as said by the Supreme Court of Georgia:

> "The city of Macon may tax occupations, but there is nothing in its charter which either expressly or by implication authorizes it to directly suppress any legitimate business, or to indirectly accomplish such a result under the guise of an ordinance purporting to impose a license tax for the purpose of raising revenue, but having for its real object the prohibition of that very business."
>
> *Morton v. Macon*, 111 Ga. 162, 50 L. R. A. 485, 487.

And in State v. Wilson, the Supreme Court of Kansas said:

> "An ordinance enacted merely under statutory authority to impose license taxes, supplemented by a general grant of power to legislate for the welfare of the city, will be held

unreasonable and void if it is manifestly in excess of the needs of the municipality, and out of proportion to other taxes. Scriven v. Lebanon, 99 Kan. 602, L. R. A. 1917 C. 460, 162 Pac. 307. But a city ordinance, except where it conforms strictly to an express and specific legislative grant, is far more amenable to judicial supervision than a statute. 6 R. C. L. 244; 28 Cyc. 370; 2 Cooley, Taxn. 3d ed. 1140. The amount of tax which may be imposed upon the right to engage in an ordinary, useful, harmless business is limited, and the power of the legislature itself in that regard is sometimes said to be confined within very narrow bounds. 25 Cyc. 611."

State v. Wilson, 101 Kan. 789, 168 Pac. 679, L. R. A. 1918B, 374, 376.

V.

CORPORATIONS ARE CITIZENS WITHIN THE PROTECTION OF THE FOURTEENTH AMENDMENT ACCORDING THEM THE RIGHT AND PRIVILEGE TO PURSUE LAWFUL OCCUPATIONS.

The fact that plaintiff is a corporation does not affect its right and privilege to engage in a lawful business, because it is a person within the constitutional guaranty of that right and privilege.

This Court in Lake Short and Michigan R. Co. v. Smith, said:

"A corporation is a person within the protection of the Fourteenth Amendment."

Lake Short &c. R. Co. v. Smith, 173 U. S. 648, 690, 19 Sup. Ct. Rep. 565, 43 L. ed. 858;

The following decisions are also to the same effect:

Minneapolis &c. R. Co. v. Beckwith, 129 U. S. 26;

Smythe v. Ames, 169 U. S. 466, 522, 526;

Gulf &c. Ry v. Ellis, 165 U. S. 154;

So. R. Co. v. Greene, 216 U. S. 406, 412, 54 L. ed. 536, 540.

And the clause in the Fifth Amendment of the Federal Constitution, declaring that no person shall be deprived of life, liberty, or property, without due process of law, also protects the plaintiff even though a corporation. Mr. Justice Field, when on circuit in California, said:

> "This amendment contains a prohibition upon the government of the United States, similar to the one in the Fourteenth Amendment against the action of the states, declaring that no person shall be deprived of life, liberty, or property, without due process of law; and it has been assumed, if not expressly held, that the provision protects the property of corporations against confiscation equally with that of individuals."

San Mateo County v. So. Pac. R. Co., 13 Fed. 151.

See also:

Brushaber v. Un. Pac. R'd. Co., 240 U. S. 1, 24, 60 L. ed. 493, 504.

VI.

THE ACT OF AUGUST 24, 1912 (38 Stat., 616), IS THE SOURCE OF THE LEGISLATIVE AUTHORITY OF THE ALASKA LEGISLATURE, TO WHOM A LIMITED AUTHORITY IS DELEGATED BY THAT ACT.

On August 24, 1912, Congress enacted the act entitled "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes," (38 Stat. L. 616), which is now commonly known as the Organic Act of Alaska.

Section 3 of that act reads:

> "That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature; Provided, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States, or to the game, fish and fur-seal laws and laws relating to fur-

bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes,' approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States."

Two very apparent and express restrictions or limitations are laid on the local legislature's power in legislating relative to the business in which plaintiff is engaged, i. e.: terming it either the fishery business, or, the manufacture of fish products, i. e., fish oil and fertilizer (fish meal). (Record, pp. 1 and 12).

One is, "that the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the * * * fish * * * laws * * * of the United States applicable to Alaska."

Inasmuch as the Act of June 26, 1906, 34 Stat. L. 478, Sec. 259, Compiled Laws of Alaska, 1913, under which plaintiff conduct its business, is the

law by which Congress governs the fish and fisheries of Alaska, in fact, the act itself is entitled "An Act for the protection and regulation of the fisheries of Alaska," it will scarcely be denied that when Congress used the term "fish laws of the United States applicable to Alaska," it referred to this act which reads in part:

> "That every person, company, or corporation carrying on the business of canning, curing, or preserving fish or manufacturing fish products within the Territory known as Alaska, * * * * *, shall, in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said busines and output as follows: Canned salmon, four cents, per case; pickled salmon, ten cents per barrel; salt salmon in bulk, five cents per one hundred pounds; fish oil, ten cents per barrel; fertilizer, twenty cents per ton * * * * *."

And as a further restriction or limitation on the powers of the Territorial Legislature, Congress further enacted that the authority of the local Legislature to alter, amend, modify, and repeal laws in force in Alaska should not extend "to the laws of the United States providing for taxes on business and trade," undoubtedly meaning thereby to refer to the Act of March 3, 1899, 30 Stat. L. 1253, 1336, as amended by the act of June 6, 1900, 31 Stat. L. 321, 330, Sec. 2569, Compiled Laws Alaska, 1913, which likewise recognizes plaintiff's business and recognizes it as the fishery business in the following words;

"That any person or persons, corporations or company prosecuting or attempting to prosecute any of the following lines of business within the District of Alaska shall first apply for and obtain license so to do from a District Court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, towit: * * * Fisheries: * * * fish-oil works, ten cents per barrel; fertilizer works, twenty cents per ton, * * *."

VII.

THERE IS A GROSS AND PATENT INEQUALITY IN THE AMOUNT OF THE TAX LEVIED ON THE PARTICULAR LINE OF BUSINESS CARRIED ON BY PLAINTIFF AS COMPARED WITH THE TAX LEVIED ON OTHER LINES OF BUSINESS.

The Territorial Legislature, which was organized under the authority of said Act of August 24, 1912 (38 Stat., 616), enacted, at its biennial sessions in 1913, 1915 and 1917, the three session laws complained of and which, so far as material parts applicable to this case are concerned, are as follows:

Chapter 52, Alaska Session Laws, 1913 (H. B. No. 96), which is entitled "An Act to establish a system of taxation, Create Revenue, and Provide for Collection thereof for the Territory of Alaska, and for other purposes," reads as follows:

"Section 1. That any person or persons, cor-"poration, or company prosecuting or attempting to

"prosecute any of the following lines of business "within the Territory of Alaska, shall first apply "for and obtain license so to do from the District "Court or subdivision thereof in said Territory, and "pay for said license for the respective lines of busi- "ness and trades, as follows, to wit:"

(Note: the schedule of taxes provided is shown in the comparative statement herein at pages 48-55, which summarized statement shows the amount of taxes on the respective occupations, businesses, &c.)

"Sec. 2. That the licenses provided for in this "act shall be issued by the clerk of the District "Court or any subdivision thereof in compliance "with the order of the court or judge thereof duly "made and entered; and the clerk of the court shall "keep a full record of all applications for "license and of all recommendations for and "remonstrances against the granting of li- "censes and the action of the court thereon: "Provided, that the clerk of said court in "each division thereof shall give bond or bonds in "such amount as the Treasurer of the Territory "may require and in such form as the Governor "may approve, the premium on said bond to be "paid from any funds in the Treasury of the Ter- "ritory of Alaska not otherwise appropriated, and "all moneys received for licenses by any clerk of a "District Court in this Territory under this act, "except the moneys derived from fisheries, (one- "half of which amount shall be paid by the clerk "into the Territorial Treasury to be made available "for the propagation and preservation of salmon "and other fish in the Territory of Alaska and to be "expended under the direction of the United States "Bureau of Fisheries) shall, except as otherwise "provided by law, be covered into the Treasury of "the Territory of Alaska, under such rules and

"regulations as the Territorial Treasurer may pre-
"scribe.

"Sec. 3. That any person, corporation or com-
"pany doing or attempting to do business in viola-
"tion of the provisions of this act, or without first
"having paid the license therein required, shall be
"deemed guilty of a misdemeanor, and upon con-
"viction thereof shall be fined, for the first offense,
"in a sum equal to the license required for the
"business, trade or occupation; and for the second
"offense, fine equal to double amount of the license
"required; and for the third offense, three times the
"license required and imprisonment for not less than
"thirty days nor more than six months; Provided,
"That each day business is done or attempted to be
"done in violation of this act shall constitute a sep-
"arate and distinct offense; Provided further, That
"in all prosecutions under this act the costs shall be
"assessed against any person, firm or corporation
"convicted of violations hereof, in addition to the
"fine or penalty imposed, and for failure to pay
"such fine and costs such person, firm or corpora-
"tion may be imprisoned, in the discretion of the
"court, at the rate of one day for every two dollars
"of said fine and costs; Provided further, however,
"that in the event of any person, firm, or corpora-
"tion shall fail to pay the license required by the
"provisions of this act and shall further fail to
"pay any fine that may be imposed by a court of
"competent jurisdiction, for such failure to so pay
"said license fee or tax required by the provisions
"of this act, judgment may be entered against such
"firm, person, or corporation and process shall be
"issued for the enforcement of the collection of said
"judgment and in the same manner as judgments
"in civil proceedings.

"Sec. 4. All United States marshals and their
"deputies as ex-officio constables, United States fish
"commissioners and their deputies, in the Territory

"of Alaska are hereby made license inspectors under "this act and shall have power and authority to go "upon premises and examine the books, papers, bills "of lading, and all other documents bearing upon "any matters provided for in this act, of any per- "son, firm, or corporation whom they have reason- "able grounds to believe is evading this act; and if "any United States marshal, or his deputy, United "States fish commissioner or his deputy, as ex-officio "constables shall find any person, firm or corpora- "tion violating this act, or any provision thereof, it "shall be the duty of said deputy marshal to go be- "fore a United States commissioner, file a com- "plaint in writing charging the person, firm or cor- "poration so violating this act with a misdemeanor, "as provided herein, and upon obtaining a warrant "upon said complaint to arrest the said person, firm, "or corporation and take him or them before the "United States commissioner issuing the warrant, "for trial.

"Approved, May 1, 1913."

Chapter 76, Alaska Session Laws, 1915 (H. B. 109.), which is entitled "An Act to establish a sys- "tem of taxation, create revenue, and provide for "collection thereof, for the Territory of Alaska, and "for other purposes; and to amend an Act entitled "'An Act to establish a system of taxation, create "revenue, and provide for collection thereof for the "Territory of Alaska, and for other purposes,' ap- "proved May 1, 1913, and declaring an emer- "gency," reads as follows:

"Section 1. That any person, firm or corpora- "tion prosecuting or attempting to prosecute any of "the following lines of business in the Territory of "Alaska shall apply for and obtain a license and "pay for said license for the respective lines of busi- "ness as follows:"

(Note: the schedule of taxes provided is shown in the comparative statement herein at pages 48-55, which summarized statement shows the amount of taxes on the respective occupations, businesses, &c.)

"Section 2. Every person, firm or corporation "desiring to engage in any of the lines of business "specified in Section One, shall first apply to and "obtain from the Territorial Treasurer a license. "If the tax for the license applied for is a fixed sum, "the amount of such license tax shall accompany the "application. If the amount of the tax is not a "fixed sum, the applicant shall state in his applica- "tion that he agrees to pay the license tax, and will "make a true return and will pay to the Treasurer "such tax on or before the 15th day of the next en- "suing January. The Applicant shall also state the "name of the person, firm or corporation making "the application, the line of business to be licensed, "and the place where said business will be carried "on. Upon the receipt of the application in proper "form, the Treasurer shall issue the license as of "the date of the application, and the applicant may "carry on the business from and after the date the "application is actually made. All license taxes, "except those where the tax is a fixed one, shall be "due and payable on December 31st of each year, "and must be paid on or before January 15th fol- "lowing. And it shall be the duty of the person, "firm or corporation engaged in any of said lines "of business, to make a return under oath, to the "Treasurer on or before January 15th of each year, "setting forth the name of the license, the number "of the license, and all the facts regarding the busi- "ness, necessary to enable the Treasurer to deter- "mine the amount of the tax to be paid. And all ap- "plications for renewals of such licenses shall be "made on or before January 15th of the calendar "year for which such renewal is made.

"Provided: Any person, firm or corporation "now engaged in any of the lines of business speci- "fied in Section one shall comply with this Act on "or before July 1st, 1915, by applying for the li- "cense (and paying the tax if a fixed sum) for the "calendar year ending December 31st, 1915, and "all taxes for the current year shall be calculated "for the year beginning January 1st, and ending "December 31st, 1915.

"Any person, firm or corporation violating any "of the provisions of this Act shall be deemed guilty "of a misdemeanor and upon conviction thereof "shall be punished by a fine of the amount of the tax "with ten per cent. added, for which the defendant "was liable. Each month or fraction of a month in "which business is carried on in violation of this "Act shall be deemed a separate offense, and prose- "cution therefor may be by information filed by the "Attorney-General or other authorized legal counsel "of the Territory in any Court of competent juris- "diction, and upon conviction the Court shall enter "a judgment for the fine and costs incurred and "such judgment may be enforced as judgments in "civil actions or by imprisonment at the rate of one "day for each two dollars of such fine and costs. "PROVIDED: That in any prosecution hereunder "the Attorney-General or other authorized legal "counsel of the Territory, may, with the consent of "the Governor, compromise the case by accepting "from the defendant a sum not less than the tax, "legal interest thereon and all costs and expenses.

"The Territorial Treasurer is authorized and "directed to prescribe suitable forms for applica- "tions, licenses, returns and such other forms as "may be necessary or proper to carry this law into "effect. He shall distribute such forms to the public "through the Clerks' of the Court and Marshal's "offices in the several divisions for use of those "subject to the taxes herein laid.

"Section 3. It shall be the duty of the Attor-"ney-General or other authorized legal counsel of "the Territory to enforce the provisions of this Act; "and for that purpose, may with the approval of "the Governor, employ such assistants as he may "deem necessary, but the compensation for the serv-"ices of such assistants shall be paid out of the fund "recovered, and the Territory shall not be liable "therefor in any event beyond fifteen (15) per cent. "of the amount so recovered in each case; assistant "counsel may, however, be employed at a previously "agreed upon and stipulated fixed fee.

"Section 4. Special remedies provided by this "Act, or other Acts of the Legislature shall not be "deemed exclusive, and any appropriate remedy "either civil or criminal or both, may be invoked by "the Territory in the collection of all taxes, and in "civil actions the same penalties may be collected, "as are herein provided in criminal actions.

"Section 5. All taxes levied, laid or provided "for in this Act and penalties and interest accrued, "are hereby declared to be a lien upon the real and "personal property of the person, firm or corpora-"tions liable therefor, paramount and superior to "all mortgages, hypothecations, conveyances and as-"signments.

"Section 6. It shall be the duty of the United "States Marshals and Deputy Marshals in the Ter-"ritory of Alaska to enforce the provisions of this "Act in their respective precincts, districts or divi-"sions and to report all violations thereof to the "Governor, and under his direction file information, "or take such proceedings as he may direct; and for "the services so performed they shall be paid under "the provisions of Section three hereof. And for all "negligence or wilful failure to perform such duties, "Marshals and Deputy Marshals shall be liable to "the Territory for all losses sustained, which liabili-"ties may be enforced in any appropriate proceed-

"ing. And in the enforcement of this Act the At-
"torney-General or other legal counsel for the Ter-
"ritory and the Marshals and Deputy Marshals
"have the right to inspect the premises and all
"books and papers of the persons, firms or corpora-
"tions claimed to be liable to the taxes herein laid,
"which right of inspection shall be enforced by the
"Courts upon application therefor.

"Section 7. The Act of which this Act is an
"amendment is hereby repealed, except in so far as
"the same is hereby re-enacted, but nothing herein
"contained shall be construed to relieve any person,
"firm or corporation from the payment of any tax,
"penalty and interest accrued and owing under the
"Act of which this Act is an amendment, but all
"such taxes, penalties and interest shall be paid, or
"collected and enforced in the same manner as taxes
"herein provided for are collected and enforced.

"Section 8. An emergency is hereby declared
"to exist and this Act shall be in full force and ef-
"fect from and after its passage and approval.

"Approved, April 29, 1915."

Chapter 74, Alaska Session Laws, 1917 (H. B. 87), which is entitled "An Act to amend Sections 1 "and 2 of Chapter 76, Laws of Alaska, 1915, en-"titled, 'An Act to establish a system of taxation, "create revenue and provide for collection thereof "for the Territory of Alaska, and for other pur-"posses; and to amend an Act entitled 'An Act to "establish a system of taxation, create revenue and "provide for collection thereof for the Territory of "Alaska, and for other purposes,' approved May 1st, "1913, and declaring an emergency,' approved "April 29, 1915," which reads as follows:

"Section 1. That Sections 1 and 2 of Chapter "76 Laws of Alaska, 1915, approved April 29, 1915, "be and the same are hereby amended to read as "follows:

"Section 1. That any person, firm or corpora-
"tion prosecuting or attempting to prosecute any
"of the following lines of business in the Territory
"of Alaska shall apply for and obtain a license and
"pay for said license for the respective lines of busi-
"ness as follows:

"1st: Attorneys-at-law, doctors, including
"persons practicing medicine, surgery, or osteo-
"pathy, and dentists; Ten Dollars per annum.

"Each member of a firm shall be liable for this
"tax.

"2nd: Automobiles operating for hire; Five
"Dollars per annum.

"3rd. Bakeries doing a business in excess of
"five hundred dollars per annum; fifteen dollars per
"annum.

"4th. Electric Light and Power Plants selling
"light, power and steam for heat and supplies to the
"public; one half of one per cent of the gross re-
"ceipts in excess of Twenty-five hundred dollars
"from light, power and steam sold.

"One half of one per cent of the net profits
"from supplies sold.

"Employment agencies operating for hire and
"collecting a fee from employees; Five Hundred
"Dollars per annum.

"6th: Fisheries: Salmon canneries, four and
"a half cents per case on Kings and Reds or Sock-
"eye; Two and a half cents per case on Medium
"Reds; two cents per case on all others.

"7th: Salteries: Two and one-half cents per
"one hundred pounds on all fish salted or mild cured,
"except herring.

"8th: Fish Traps: Fixed or floating, one
"hundred dollars per annum, so called dummy traps
"included.

"9th: Cold Storage Plants: Doing a busi-
"ness of one hundred thousand dollars per annum
"or more, five hundred dollars per annum; doing a

"business of seventy-five thousand dollars per an-
"num and less than one hundred thousand dollars,
"three hundred and seventy-five dollars per annum;
"doing a business of fifty thousand and less than
"seventy-five thousand dollars per annum, two hun-
"dred and fifty dollars per annum; doing a busi-
"ness of twenty-five thousand and less than fifty
"thousand dollars, per annum, one hundred and
"twenty-five dollars per annum; doing a business
"of ten thousand dollars and less than twenty-five
"thousand dollars per annum, fifty dollars per an-
"num; doing a business of four thousand, and less
"than ten thousand dollars per annum; twenty-five
"dollars per annum; doing a business of under four
"thousand dollars per annum, ten dollars per an-
"num . The 'annual business' under this section
"shall be considered the gross amount received for
"the product and for storage of produce for others.

"10th: Fish-Oil-Works: Using Herring in
"whole or in part in the manufacture of fish-oil;
"two dollars per barrel.

"Fertilizer and Fish Meal Plants: Manufactur-
"ing fertilizer and Fish Meal in whole or in part
"from herring; two dollars per ton.

"11th: Laundries: Doing a business of over
"Two Thousand and less than Five Thousand dol-
"lars per annum, twenty-five dollars per annum;
"doing a busines of five thousand or more and less
"than ten thousand dollars per annum, fifty dollars
"per annum; doing a business of ten thousand dol-
"lars or more per anum, seventy-five dollars per
"annum.

"12th: Meat Markets: Doing a business of
"not less than ten thousand nor more than twenty-
"five thousand dollars per annum, twenty-five dol-
"lars per annum; doing a business of not less than
"twenty-five thousand nor more than fifty thou-
"sand dollars per annum, fifty dollars per annum;
"doing a business of not less than fifty thousand nor

"more than seventy-five thousand dollars per an-
"num, one hundred dollars per annum; doing a busi-
"ness of not less than seventy-five thousand dollars
"nor more than two hundred thousand dollars per
"annum, two hundred and fifty dollars per annum;
"doing a business of over two hundred thousand dol-
"lars per annum, five hundred dollars per annum.
"That every separate meat market or establishment
"shall be considered a separate business.

"13th: Mining: One per cent. of the net in-
"come in excess of Five thousand dollars. By 'net'
"income is meant the cash value of the output of
"the mine less operating expenses, repairs and bet-
"terments, actually made and royalties actually
"paid, and all taxes paid under Section 2569 of the
"Compiled Laws of Alaska.

"Provided, that the lessor of any mine operated
"under a lease shall be deemed to be engaged in
"mining within the provisions of this act and the
"royalties, less the cost of collecting the same, re-
"ceived by him, shall be deemed to be the net income
"within the provisions of this Act.

"Provided, further that where a mine is op-
"erated under a lease with option to purchase and
"the terms of the contract provide that royalties
"paid thereunder shall be credited as part of the
"purchase price, such royalties shall not be deducted
"from the gross output in computing the net in-
"come.

"No deduction shall be made on account of de-
"preciation or machinery, interest on bonds or
"money borrowed or other taxes paid. By 'Mining'
"is meant any operation by which valuable metals,
"ores, minerals or marketable stone is extracted
"from the earth.

"14th: Ships and Shipping: Freight and
"Transportation: Ocean and coast-wise vessels do-
"ing business for hire plying in Alaska waters,
"registered in Alaska and not registered elsewhere

"in the United States and not paying a tax or li-
"cense elsewhere, and freight and passenger lines
"propelled by mechanical power registered in the
"Territory of Alaska and not paying a license or
"tax elsewhere in the United States, and river and
"lake steamers and barges as well as transportation
"lines doing business wholly within the Territory of
"Alaska, one dollar per ton on net tonnage, custom
"house measurement of such vessel.

"15th: Telephone Companies: One-half of one
"per cent. of gross receipts in excess of Fifteen
"hundred dollars ($1500.00).

"16th: Water works: Selling water or power
"to the public one half of one per cent. of gross
"receipts in excess of twenty-five Hundred Dollars
"($2500.00).

"17th: Public Messengers: Twenty-Five Dol-
"lars ($25.00) per annum.

"Section 2. Every person, firm or corpora-
"tion desiring to engage in any of the lines of busi-
"ness specified in Section 1 shall first apply for and
"obtain from the Territorial Treasurer a license.
"If the tax for the license applied for is a fixed one,
"the amount of such license tax shall accompany the
"application. If the amount of the tax is not a
"fixed sum, the applicant shall state in his appli-
"cation that he agrees to pay the license tax and
"will make a true return and will pay to the
"Treasurer such tax on or before the fifteenth of
"the next ensuing January.

"The applicant shall also state the name of the
"person, firm or corporation making the applica-
"tion; the line of business to be licensed and the
"place where said business will be carried on. Upon
"the receipt of the application in proper form, the
"Treasurer shall issue the license as of the date of
"the application, and the applicant may carry on
"the business from and after the date the applica-
"tion was actually made.

"All license taxes, except those where the tax is "a fixed one shall be due and payable on December "thirty-first of each year and must be paid on or "before January fifteenth following.

"Provided, that the Treasurer shall have the "power to extend such time until the fifteenth of "the next ensuing March upon the special showing "made by the licensee that such extension is neces- "sary in order to enable him to ascertain the "amount of the taxes due, and it shall be the duty "of the person, firm or corporation engaged in any "of said lines of business to make a return under "oath to the Treasurer on or before January fif- "teenth of each year, or in case of an extension as "above provided, on or before March fifteenth, set- "ting forth the name of the licensee, the number of "the license and all the facts regarding the busi- "ness necessary to enable the Treasurer to determine "the amount of the tax to be paid and all applica- "tions for renewals of such licenses shall be made "on or before January fifteenth of the calendar year "for which such renewal is made.

"Provided, that any person, firm or corpora- "tion engaged in or about to engage in mining, may "designate in his application for a license the last "day of any month in the year as the day of the "closing of his fiscal year, and shall be entitled to "have the tax payable by such person, firm or cor- "poration computed upon the basis of the net in- "come, ascertained as herein provided for the full "year ending on the day so designated in the year "preceding the date when the tax is due, instead of "upon the basis of the net income of the calendar "year preceding the date when the tax is due.

"Any person, firm or corporation violating any "of the provisions of this Act shall be deemed "guilty of a misdemeanor and upon conviction "thereof shall be punished by a fine of the amount "of the tax with ten per cent. added for which the

"defendant was liable. Each month or fraction of "a month in which business is carried on in viola- "tion of this Act shall be deemed a separate of- "fense and prosecution therefor may be by informa- "tion filed by the Attorney-General or other author- "ized legal counsel of the Territory in any Court of "competent jurisdiction, and upon conviction the "Court shall enter a judgment for the fine and costs "incurred, and such judgment may be enforced as "judgments in civil action or by imprisonment at "the rate of one day for each two dollars of such "fine and costs. PROVIDED: That in any prose- "cution hereunder, the Attorney-General or other "authorized legal counsel of the Territory may, "with the consent of the Governor, compromise the "case by accepting from the defendant a sum not "less than the tax, legal interest thereon and all "costs and expenses.

"The Territorial Treasurer is authorized and "directed to prescribe suitable forms for applica- "tions, licenses, returns and such other forms as "may be necessary or proper to carry this law into "effect. He shall distribute such forms to the pub- "lic through the Clerks' of the Court and Marshal's "office in the several divisions for use of those sub- "ject to the taxes herein laid.

"Section 3. The Sections of the Act which "this Act amends are hereby repealed, except in so "far as the same are hereby re-enacted, but nothing "herein contained shall be construed to relieve any "person, firm or corporation from the payment of "any tax, penalty and interest accrued and owing "under the sections of this Act which this act "amends, but all such taxes, penalties and interest "shall be paid, collected or enforced in the same "manner as taxes herein provided for are collected "and enforced.

"Except as otherwise provided in this Act, all "licenses shall be issued for the calendar year be-

"ginning on January first and ending on December "thirty-first of each year, and where the tax is not "a fixed sum but is computed after the close of "the year's business, it shall be computed on the "basis of the business done during such calendar "year, and all taxes for the current year shall be "calculated upon the basis of the schedule adopted "by this Act.

"Approved May 3, 1917."

A comparison between the Federal license taxes and the Territorial license taxes indicates very strongly the Territorial Legislature's real purpose when it laid its tax on plaintiff's business. Under the act of June 6, 1900, 31 Stat. L. 331, Sec. 2569, Compiled Laws of Alaska, 1913, supra, Congress laid a license tax on plaintiff's business of 10 cents per barrel on fish oil, and 20 cents per ton on fertilizer (fish-meal). Congress apparently believed that these were fair and reasonable license taxes to be borne by plaintiff, because six years later, when it enacted the act of June 26, 1906, 34 Stat. L. 478, Sec. 259, Compiled Laws of Alaska, supra, it again laid that tax on plaintiff's business.

The Territorial legislature, however, when it laid a license tax on plaintiff's business, must have thought, if it had no ulterior motive, that the Congressional license tax was absurdly low, because it made its license tax on fish oil $2.00 per barrel, or twenty times the tax that Congress had laid, and on fishmeal $2.00 per ton, or ten times the Congressional tax.

A comparative statement of the license taxes

laid on various businesses, including plaintiff's, by the 1913, 1915 and 1917 Territorial acts may be of value in disclosing the real nature of the license tax imposed on plaintiff's business, towit:

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws		
	1913	1915	1917
Attorneys at law	.....	$10.00	$10.00*
Doctors	.....	10.00	10.00*
			Including persons practicing medicine, surgery, osteopathy.
Dentists	.....	10.00	$10.00*
*Each member of firm subject to tax			
Automobiles	.....	$5.00	.....
Automobiles operating for hire	.....	.....	$5.00
Bakeries	.....	$15.00	$15.00
Electric light and power plants: Selling light and power to the public	.....	½% of gross receipts in excess of $2,500.	.....
Selling light, power and steam for heat and supplies to the public	.....	.....	½% of gross receipts in excess of $2500 from light, power and steam sold; ½% net profits from supplies sold.
	.....	.....	

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws		
	1913	1915	1917
Employment agencies, operating for hire and collecting a fee from employees	.....	$500.00	$500.00
Fisheries: Salmon canneries — Sockeyes and Kings	7c per case	.....	.....
Humpbacks, Cohoes, Chums	½c per case	.....	.....
Kings, Reds, Sockeyes	.....	4c per case	4½c per case
Medium Reds	.....	2c per case	2½c per case
All other Salmon	.....	1c per case	2 c per case
Salteries—On all fish salted or mildcured, except herring	.....	2½c per 100 lbs.	2½c per 100 lbs.

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws		
	1913	1915	1917
Fish-oil works, using herring in whole or in part in manufacture of fish oil	.....	.....	$2.00 per bbl.
Fertilizer and fish meal plants, manufacturing fertilizer and fish meal in whole or in part from herring	.....	.....	$2.00 per ton
Fish traps: fixed or floating, including dummy traps	.....	$100.00	$100.00

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws		
	1913	1915	1917
Cold storage plants: doing business of:			
$100,000 per annum	$500.00*	$500.00	$500.00
75,000 less than $100,000	375.00*	375.00	375.00
50,000 less than 75,000	250.00*	250.00	250.00
25,000 less than 50,000	125.00*	125.00	125.00
10,000 less than 25,000	50.00*	50.00	50.00
4,000 less than 10,000	25.00*	25.00	25.00
Under $4,000 per annum	10.00*	10.00	10.00
(*The qualification "less than" the larger amount does not appear in the 1913 act.)			

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws		
	1913	1915	1917
Laundries: doing business per annum of: More than $5,000	$25.00	$25.00	.....
Over $2,500 less than $5,000	.....	.....	$25.00
$5,000 but less than $10,000	.....	.....	50.00
$10,000 or more	.....	.....	75.00
Furs	½% of gross value	.....	.....
Fishing vessels propelled by mechanical power over 30 tons net and plying or fishing in Alaskan waters, per net ton, custom house measurement	$1.00	.....	.....
Insurance companies	1% on premiums	.....	.....
Express companies	1% of business done	.....	.....

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws 1913	1915	1917
Meat markets, doing business per annum:			
More than $5,000 and less than $10,000	$ 25.00	.....	.....
$ 10,000	50.00	.....	.....
50,000	75.00	.....	.....
75,000	375.00	.....	.....
100,000	500.00	.....	.....
Not less than $10,000 nor more than $25,000	.....	$ 10.00*	$25.00*
Not less than $25,000 nor more than $50,000	.....	30.00*	50.00*
Not less than $50,000 nor more than $75,000	.....	100.00*	100.00*
Not less than $75,000 nor more than $200,000	.....	250.00*	250.00*
Over $200,000 per annum	.....	500.00*	500.00*
(*1915 and 1917—Every separate meat market or establishment considered a separate business.)			

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws		
	1913	1915	1917
Mining	½% on net income over and above $5,000	1% of net income in excess of $5,000.	1% of net income in excess of $5,000.
Public scavengers	$50.00	$50.00	.....
Public messengers	$25.00	$25.00	$25.00
Lighterage companies on freight handled or lightered	10c per ton	.....	.....
Lodging houses	$10.00	.....	.....
Reindeer owned by white men	25c per head	.....	.....
Transportation: on every ton freight shipped into or from Territory	10c per ton	.....	.....
Ships and shipping	.....	$1.00 per net ton	$1.00 per net ton
Telephone companies	½% of gross volume of business over $2,400	½% of gross receipts in excess of $1,500.	½% of gross receipts in excess of $1,500.

Class, Occupation, Article, &c.	Annual License Tax, Alaska Session Laws		
	1913	1915	1917
Water works: selling water or power to public	.....	1% of gross receipts in excess of $2,500.	1% of gross receipts in excess of $2,500.
Gill nets, per hundred fathoms or fraction	.....	$1.00	.....
Transient and itinerant merchants	$200.00	.....	.....

Hence, it appears that the basis of levying the license taxes on the various businesses, trades, and occupations, is not on any fixed scheme, but in some instances is on a flat rate per annum basis regardless of business done or product produced; in others, a flat rate per annum on a fluctuating scale; in others, a flat rate per annum per unit of product; in others, a fixed percentage on gross receipts in excess of a fixed deduction; in others, a fixed percentage on net profits; but none of these vagaries cause the tax on any other business to approach even within an approximate distance of the tax laid on plaintiff, its business or product.

Taking those businesses, occupations, trades or products, on which it is possible either under the pleadings or the acts themselves to compute the rate of taxation, we find:

Gross Receipts Tax Basis, With Deduction:

Electric light and power plants, selling light, power and steam to the public; ½% on gross receipts in excess of $2,500 deduction;

Telephone companies: ½% on gross receipts in excess of $1,500 deduction;

Water works: 1% on gross receipts in excess of $2,500 deduction.

As opposed to this is the tax on plaintiff's business or product, on which no deduction is allowed: For 1917, 9.31% on gross receipts from

fish oil, and 4.6% on gross receipts from fish meal; for 1918, 5.6% on fish oil, and 2.92% on fish meal. (Record, pp. 5, 6, 16 and 17.)

Flat Rate, Fluctuating Scale, Tax Basis; on Business Done:

Cold storage plants: from 0.25% to 0.5%;

Laundries: from 0.25% to 0.75%;

Meat markets: from 0.13% to 0.25%.

As opposed to this, plaintiff's tax ranged during the years 1917 and 1918 from 2.92% to 9.31%.

Per Unit of Product Tax Basis, Per Annum:

Salmon canneries: from 0.303% to 0.5% for the year 1917; from 0.303% to 0.478% for the year 1918;

Salt and mildcured fish: 0.25%, 1917; and 0.277%, 1918.

As opposed to this, plaintiff's tax per unit of product amounted to: 9.31% on fish oil and 4.6% on fish meal for the year 1917; and 5.6% on fish oil and 2.92% on fish meal for the year 1918.

Net Income Tax Basis, with Deduction of $5,000.00:

Mining: 1% on net income in excess of $5,000.00.

As opposed to this, plaintiff's tax amounted to:

Fish oil: 1917, $8,224.00, or 84% of net profits; in 1918, $5,440.00, or 113.64% of net profits. Hence, it is apparent that if plaintiff had been subject on its fish oil business to the same tax laid on mining, in the year 1918 it would have had

no tax to pay as its net income, assuming that is equivalent to net profits, would have been less than the deductible allowance of $5,000.00; whereas, in 1917, on the same theory, plaintiff would have paid $47.90 taxes instead of $8,224.00 on its fish oil business.

Fish meal: in 1917, $2,074.00, or 8.18% of net profits; in 1918, $1,290.00, or 28.12% of net profits. Hence, using the assumption taken in the illustration relative to fish oil, plaintiff's tax on fish meal for the year 1917 would have amounted to $208.54, or less than one tenth of what it actually paid, namely $2,074.00; and for the year 1918 its net profits (net income) would have been less than the deductible allowance of $5,000.00, and it would have paid no taxes, instead of actually paying $1,290.00.

Net Profits Tax Basis:

Electric light and power plants, on supplies sold; ½%;

Plaintiff's business, fish oil: 84%, 1917; and 113.64%, 1918. Fish meal 8.18%, 1917; and 28.12%, 1918. (Record, pp. 5, 6, 16 and 17).

As stated by the learned trial judge, it thus appears "that there is a gross and patent inequality in the amount of the tax levied on this particular line of business as compared with the tax levied on other lines of business if the allegations of the complaints are true" (Record, p. 29).

VIII.

THE TERRITORIAL LEGISLATION AND THE TAXES IMPOSED BY IT ARE IN VIOLATION OF THE CONSTITUTION, BECAUSE THE LEGISLATURE HAS PLAINLY ABUSED ITS TAXING POWER BY EXERCISING IT, NOT FOR REVENUE, BUT FOR THE PURPOSE OF DESTROYING RIGHTS AND PRIVILEGES ACCORDED TO THE PLAINTIFF BY THE CONSTITUTION AND THE ALASKA ORGANIC ACT.

The license taxes and the legislation enacting them cannot be sustained on the principle that the "power to tax is the power to destroy" (M'Culloch v. Maryland, 4 Wheat. 314, 4 L. ed. 579), because "the power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land" (Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 563; Alaska Pacific Fisheries v. Alaska, 236 Fed. 52.)

While this Court has said:

> "Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise."

McCray v. United States, 195 U. S. 27, 59, 49 L. ed. 78, 97.

We respectfully urge that this principle does not conflict with the contention that the legislation and taxes in question are unconstitutional, because the legislature was without lawful power to enact the legislation and lay the taxes, for the reasons:

First, because the legislature has imposed the tax on plaintiff's business, but has not laid it on other similar businesses, thus singling out plaintiff's business as the sole business to bear the burden of revenue out of the class to which it belongs, for it is admitted:

> "That although there are other persons and corporations in the said Territory who are engaged in the manufacture of fish oil, fish meal and fertilizer from fish, inasmuch as they do not use herring either in whole or in part, no license or other tax whatsoever is assessed against or levied upon them by the Territory of Alaska, and that the said business of said other persons and corporations is in all essentials the same as the business of this plaintiff and there are no distinctions that differentiate the said business of plaintiff from said business of said other persons and corporations, and that the levying of a license tax on plaintiff's said business, without levying a similar tax on the manufacture of fish oil, fish meal and fertilizer from fish, other than herring, either in whole or in part, is unreasonable, purely arbitrary, discriminatory and for the purpose of prohibiting and destroying plain-

tiff's said business and industry." (Record, pp. 6 and 17.)

It thus appears that not only was the taxing power exerted without any basis for classification, but that it was a merely arbitrary imposition of a license tax on one business, and not on others of the same class, although there are no distinctions between them, which is in violation of the 5th Amendment of the Constitution because it takes plaintiff's property without due process of law and, without due process of law, singles it out for a tax without levying a like tax on other businesss of the same class.

In McCray v. United States, supra, this Court said:

> "Conceding, merely for the sake of argument, that the due process clause of the 5th Amendment would avoid an exertion of the taxing power which, without any basis for classification, aribitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand."

This Court held that such concession would be inapposite in that case because there was a distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter, but in this case as shown it is admitted that there is no distinction between plaintiff's fish oil and fish meal business and the fish oil and fish meal business conducted by other

persons in the Territory on whom no tax is laid.

We urge that it is violative of the Fifth Amendment on the theory that Alaska Territorial legislation is dependent and not wholly separate legislation from Congressional legislation, that is to say, that the Territorial Legislature deriving as it does its powers from Congress is not a separate sovereign legislature and has no actual separate entity apart from its creator (Dakota v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355, 357), but, if this theory be unwarranted, then we urge that the due process clause of the Fourteenth Amendment has been violated.

Second, because the Territorial Legislature has no lawful power to prohibit plaintiff's business as Congress has specifically reserved to itself by the Organic Act (38 Stat. L. 616) the right to legislate relative to the fisheries of Alaska, and has explicitly withheld from the Territory the power to enact legislation altering, modifying, amending, or repealing the "fish laws of the United States applicable to Alaska" and the "laws of the United States providing for taxes on business and trade," and, regardless of the authority of the Territory to impose additional licenses or taxes, it has no authority to impose such licenses or taxes as will alter, modify, amend or repeal, either directly or in effect, those laws thus reserved from the Territory's legislative authority, and, even if no such restriction existed, that the legislation and taxes are un-

constitutional and illegal because they select plaintiffs' business, although no different than other businesses of the same class, as the sole one to be discriminated against and prohibit and destroy it by a prohibitory tax irrespective of the fact that it is a lawful pursuit, the right to pursue which is guaranteed to plaintiff by the fundamental law of the land.

The premise is admitted that "plaintiff's business is a useful, legitimate and commendable business and industry and is of use and value to the economic, industrial and commercial welfare of the Territory of Alaska and the United States" (Record, pp. 1 and 12).

It is likewise admitted that said taxes:

> "While ostensibly enacted solely as revenue measures, were in fact enacted for the purpose of prohibiting and restraining, under the guise of a revenue measure, this plaintiff from continuing its said business and industry, and to abolish plaintiff's said business and confiscate its property; and that said acts * * * will not produce any revenue for the reason that said tax is so exorbitant, unfair, unreasonable, extortionate, confiscatory and prohibitive that, if said acts * * * be annually enforced, it will entirely prohibit plaintiff and all others from engaging" in said business. (Certificate of Correction, p. 1; Record, pp. 5, 15, 16.)

On a similar contention in McCray v. United States, supra, this Court said:

"Let us concede, for the sake of argument only, the premise of fact upon which the proposition is based. Moreover, concede, for the sake of argument only, that even although a particular exertion of power by Congress was not restrained by any express limitation of the Constitution, if, by the perverted exercise of such power, so great an abuse was manifested as to destroy fundamental rights which no free government could consistently violate, that it would be the duty of the judiciary to hold such acts to be void upon the assumption that the Constitution, by necessary implication, forbade them.

"Such concession, however, is not controlling in this case. This follows when the nature of oleomargarine, artificially colored to look like butter, is recalled. As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the states may, in the exertion of their police powers, without violating the due process clause of the 14th Amendment, absolutely prohibit the manufacture of the article. It hence results, that, even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction."

p. 63, 195 U. S.; p. 98, 49 L. ed.

But, as we have seen, there is no distinction between plaintiff's fish oil and fish meal business

and the fish oil and fish meal business conducted by other persons in the Territory, and plaintiff's business is admittedly a lawful business, and is protected from the police powers of the Territory by the express limitations of the Organic Act (28 Stat., 616); hence, regardless of what Congress might have power to do in suppressing it, the pro- might have power to do in its suppression, the prohibition of it by the Territorial Legislature is not only unconstitutional but is also beyond the lawfully delegated authority of that Legislature.

Inasmuch as we have also just seen that it is admitted that the prohibition is made under the guise of revenue legislation, but that as a matter of fact no revenue will be produced thereby, we submit that a plain case of perverted abuse of the taxing or licensing power is disclosed similar to that spoken of by this Court in McCray v. United States, supra, when Mr. Justice, now Mr. Chief Justice, White said:

> "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred."

p. 64, 195 U. S.; p. 99, 49 L. ed.

Or as later said by Mr. Chief Justice White:

"And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

Brushaber v. Union Pac. R'd. Co., 240 U. S. 1, 24, 60 L. ed. 493, 504.

IX.

THE LEGISLATION AND THE TAXES IMPOSED THEREUNDER ARE UNREASONABLE, ARBITRARY, CONFISCATORY AND PROHIBITORY, AND UNJUSTLY DISCRIMINATE AGAINST PLAINTIFF AND ITS BUSINESS, AND ARE IN VIOLATION OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, BECAUSE PLAINTIFF IS DENIED THE EQUAL PROTECTION OF THE LAWS AND ITS PROPERTY IS TAKEN FROM IT WITHOUT DUE PROCESS OF LAW.

It may be urged that there is no inequality because one class of business pays a different, either smaller or larger, tax than some other class of business, but,even though conceding, for the sake of the argument, that the manufacture of fish oil or fish meal may be properly classified as a business as distinguished from a telephone exchange, or mining, or canning, salting or mild-curing fish, there is no reasonableness or justification in classifying the manufacture of fish oil or fish meal from herring in whole or in part as a business distinguished from manufacturing fish oil or fish meal from any other kind of fish in whole or in part, and laying an extortionate, prohibitory tax on the former, and none whatsoever on the latter.

The legislature might just as well classify the bakery business into the busines of baking bread from wheat in whole or in part, and the business of baking bread from rye, barley or some other grain, and, instead of laying an annual tax of $15.00, as it did, on all bakeries doing a business in excess of $500.00 per annum, levy an extortionate tax on the baker making bread in whole or in part from wheat, and entirely exempt the baker who makes bread from any other grain or vegetable. Such distinction would be entirely as fair as a discrimination between fish oil and fish meal made from herring in whole or in part, as opposed to fish oil and fish meal made from any other fish.

Equally unreasonable classifications would have been to have classified attorneys-at-law as corporation lawyers, damage lawyers, trial lawyers, or of-five lawyers, or electric light and power plants on the basis of whether they produced their light and power from coal, wood, water, or oil, and not on the basis of what they sold; or cold storage plants on the basis of whether they froze their fish by natural or by artificial ice, or whether they froze halibut as distinguished from herring, cod or sablefish; or meat markets as to whether they handled beef, mutton or pork.

There are, of course, many kinds of oil, for instance, animal oil, vegetable oil, and mineral oil; and countless subdivisions such as cottonseed oil, olive oil, whale oil, petroleum, castor oil. (See list, Funk & Wagnall's New Standard Dictionary). But there is no defined oil known as herring oil or herring fish oil, and fish oil itself is a generic term covering oil produced from marine mammals or fish, except that it is sometimes used specifically to mean cod-liver oil (idem); in fact the legislation in question does not presuppose that any distinction exists between the fish oil produced by plaintiff and that produced from any other kind of fish, because the legislature laid the tax on oil made in whole or in part from herring, that is to say, made either wholly from herring, or made partly from herring and partly from some other fish; hence, the Legislature recognized that fish oil is a generic term,

and that fish oil is the resultant product of plaintiff's business regardless of whether herring alone is used to make it, or nine parts salmon and one part herring is used, or five parts salmon, four parts eulachan, and only one part herring; so that, as a matter of fact, the product, whether oil or meal, is subjected to the tax if it contain any part of herring, however slight, in its manufacture regardless of the percentage of other fish that might be used therein; thus, denoting that the legislature in fact by its tax intended to prohibit and prevent the use of herring for fish oil and fish meal, and not to raise revenue thereby.

There perhaps may be conjectured a distinction between canned salmon and salted salmon sufficient to warrant a different license tax basis, in that, while made from the same basic matter, salmon fish, one is manufactured in a cannery, the other in a saltery, by different processes and appliances, with a resultant different product, but a suppositious case, to that at bar, would be to discriminate between "sea-island cotton seed oil" and "upland cotton seed oil," prohibitorily taxing one and exempting the other, or to classify raspberry juice, the production of which is a large industry on the Pacific coast, as "red raspberry juice" and "black raspberry juice," and extortionately tax the one and exempt the other, even though made by the same processes and appliances, from the same basic plant or berry, and resulting in the same

product.

The Territorial legislature in exercising its power, if any exists, to classify plaintiff's business would have to hinge the differences or resemblances used as the basis for the classification upon the object which it has in view and the ultimate classification reached or made, although it might be narrow or wide according to that object, would have to be reasonable and logical, and not arbitrary.

This Court, speaking through Mr. Justice McKanna, in a comparatively recent case, said:

> "Classification is not different in law than in other departments of knowledge. 'It is the grouping of things in speculation or practice because they "agree with one another in certain particulars." ' Billings v. Illinois, 188 U. S. 97, 102, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272. Upon what difference or resemblances it may be exercised depends necessarily upon the object in view, may be narrow or wide according to that object. Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further: make a rule of conduct depend upon it, and distinguish in legislation between red-haired men and black-haired men, and the classification would immediately be seen to be wrong, it would have only arbitrary relation to the purpose and province of legislation."
>
> *Tanner v. Little*, 240 U. S. 369, 382, 60 L. ed. 691, 701.

Again this Court said:

"Arbitrary selection, it has been said, cannot be justified by calling it classification."

S. R. Co. v. Greene, 216 U. S. 400, 417; 54 L. ed. 536, 541.

In Cotting v. Kansas City Stock Yards Co., infra, this Court held that a Kansas statute in which the classification was not based upon inherent differences in the character of the business, but was a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each might do, was not constitutional and amounted to a denial of the equal protection of the laws. While the discrimination was upon volume of business done, we respectfully submit that the language of the Court is amply broad enough to warrant the conclusion that the decision would have been the same had the statute been based solely on a distinction as to whether Hereford cattle instead of Galloway cattle were being handled. However, such is the sole distinction used as a basis in this case, namely, whether the fish oil and fish meal is manufactured from herring, in whole or in part, or is manufactured from some other kind of fish, disregarding the fact that there are no inherent differences in the character of the business.

The pleadings admit "that although there are other persons and corporations in the said Terril tory who are engaged in the manufacture of fish oil, fish meal and fertilizer from fish, inasmuch as

as they do not use herring, either in whole or in part, no license or other tax whatsoever is assessed against or levied upon them by the Territory of Alaska, and that the said business of said other persons and corporation is in all essentials the same as the business of this plaintiff and there are no existing distinctions that differentiate the said business of plaintiff from said business of said other persons and corporations; and that the levying of a license tax on plaintiff's said business, without levying a similar tax on the manufacture of fish oil, fish meal and fertilizer from fish, other than from herring in whole or in part, is unreasonable, purely arbitrary, discriminatory and for the purpose of compelling plaintiff to cease its said business and industry." (Record, pp. 6 and 17).

> But "Every one has a right to demand that he be governed by general rules and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments."
>
> *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 109.

See also:

Cooley's Constitutional Limitations, 5th ed., 484, 486.

State v. Haun, 61 Kan. 146;

Yut Wo v. Hopkins, 118 U. S. 356;

In re Yot Sang, 75 Fed. 983.

The want of any tax on the use of herring for any other purpose, such as canned, mildcured, smoked, salted, sardines, and for bait, strengthens the conclusion that the tax was not laid in reality, but only ostensibly, for revenue, and, furthermore, that it was a direct legislative attack on plaintiff's business alone, because it is apparent that, no matter how the Legislature considered plaintiff's use of herring in its business, the Legislature at the same time fostered the use of herring for all other purposes, except that use made of them by plaintiff, by causing the businesses using herring for other purposes to bear no part of the burden of the revenues.

Although the legislature thus exempted from taxation all other uses and preparations of herring, it so refined its discrimination against plaintiff that, while the manufacturers of fish oil and fish meal from all other kinds of fish are also entirely exempted from license taxation, plaintiff, upon its using even one part herring for its product, becomes, under the same legislation, subject to an extortionate, prohibitory tax.

A somewhat similar discrimination was spoken of by Mr. Justice Brown in a suppositious case in American Sugar Refining Co. v. Louisiana, wherein this Court said:

> "The act is not one exempting planters who use their sugar in the manufacture of articles of a wholly different description, such as confectionery, preserves or pastry, or such as one which should exempt the farmer who devoted his corn or rye to the making of whiskey, while other manufacturers of these articles were subjected to a tax."
>
> *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89.

This legislation under view exempts the fisherman or canneryman who uses herring for any purpose other than the manufacture of fish oil and fish meal (fertilizer), and also exempts the person who manufactures fish oil and fish meal (fertilizer) from any other fish than herring, but subjects to a prohibitory tax the person who manufactures fish oil and fish meal (fertilizer) from herring either in whole or in part.

And if the latter should not pay this tax then he is made a criminal and subject to heavy fine and penalties for Chap. 74, Alaska Session Laws, 1917, Section 2, 6th paragraph, reads:

> "Any person, firm, or corporation violating any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of the amount of the tax with ten per cent added

for which the defendant was liable. Each month or fraction of a month in which business is carried on in violation of this Act shall be deemed a separate offense and prosecution therefor may be by information filed by the Attorney-General or authorized legal counsel of the Territory in any Court of competent jurisdiction, and upon conviction the Court shall enter a judgment for the fine and costs incurred, and such judgment may be enforced as judgments in civil actions or by imprisonment at the rate of one day for each two dollars of such fine and costs. * * * * *."

Whereas, if he uses no herring—but it will be noted he must not use the slightest part of that kind of fish—then he is deemed a praiseworthy citizen to the extent that he is not even required to bear a part of the burden of the revenues of the Territory, but his fish oil and fish meal is entirely exempted from a license tax.

The resulting discrimination is analogous to that condemned by the Supreme Court of Oregon in State v. Wright, wherein that Court said:

"A statute which directly or by implication grants special privileges, or imposes special burdens, upon persons engaged in substantially the same business, under the same conditions, cannot be sound, because it is class legislation, and an infringement of the equal rights guaranteed to all * * *. A peddler could go about the country selling to the same customer a stove, buggy or fanning mill, and groceries, dry goods, or any other article not within the prohibited list, and, under this statute, if he had no license, part of his sales would render

> him a criminal, while part would be praiseworthy and proper. Such a classification is purely arbitrary, and plainly denies the equal protection of the law to those against whom it is directed. The constitutional objection to it is that it operates unequally, in that it requires certain persons engaged in peddling a few enumerated, useful articles to obtain a license, and exempts others engaged in the same business, and, therefore, is void. * * * *. It is true a state may impose a tax on, or require a license from, persons engaged in certain callings or trades, without being bound to include all persons or all property that may be legitimately taxed for governmental purposes. But the classification must apply alike to all engaged in the business or occupation."
>
> *State v. Wright*, —— *Ore.* ——, 100 Pac. 296, 21 L. R. A. (N. S.) 349, 353.

The discrimination under the admitted facts plainly denies and operates to deny plaintiff the equal protection of the laws.

This Court said in Connolly v. Union Sewer Pipe Co.:

> "A state may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it

cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 562, 563.

And as said by this Court in Cotting v. Kansas City Stock Yards Co.:

"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other."

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 111, 112.

And as also said by this Court:

"On the other hand, it is also true that the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated."

Atchison, Topeka &c. R. v. Matthews, 174 U. S. 96, 104;

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids it."

Gulf, &c. R'd Co. v. Ellis, 165 U. S. 150, 159.

And this Court said, in a tax case arising in Pennsylvania:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities

for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

Bell's Gap Rd. Co. v. Pennsylvania, 134 U. S. 232, 237.

And, while we contend that the Territorial legislation is void on its face under the admitted facts, in any event, even if that were not true, we urge that the legislation is void because, under the admitted facts, the actual administration and enforcement of the legislation operates to arbitrarily take plaintiff's property without due process of law, and prohibits plaintiff from engaging in and exercising its lawful privilege and right to engage in a lawful business, and therein denies plaintiff the equal protection of the laws.

As said by this Court in Yick Wo. v. Hopkins, Mr. Justice Mathews speaking:

"But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civ-

ilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. * * * * * * (p. 370.)

"In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinance in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal

justice is still within the prohibition of the Constitution. (p. 373.)."

Yick Wo v. Hopkins, 118 U. S. 356, 370, 373, 374.

We also refer to:

Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 925;

Magoun v. Illinois, &c., Bank, 170 U. S. 283;

Tanner v. Little, 240 U. S. 369, 60 L. ed. 691.

Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 696.

Rast v. Van Deman & Lewis Co., 240 U. S. 342, 60 L. ed. 679;

Am. Sugar Refining Co. v. Louisiana, 179 U. S. 69, 92;

Missouri v. Lewis, 101 U. S. 22, 31;

Haynes v. Missouri, 120 U. S. 68, 71;

Gibbons v. Ogden, 9 *Wheat.* 23, 6 L. ed 1, 210;

Sinot v. Davenport, 22 How. 227, 243;

Missouri &c., Ry. v. Haber, 169 U. S. 613, 626;

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169;

Mugler v. Kansas, 123 U. S. 661;

Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 1343;

Allgever v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835;

Booth v. Illinois, 184 U. S. 425, 429, 46 L. ed. 623, 626;

So. R. Co. v. Greene, 216 U. S. 400, 417, 54 L. ed. 536, 541;

Ex parte Hutchison, 137 Fed. 949, 950;

In re Yot Sang, 75 Fed. 983;

There are also many State decisions. Among them:

Oregon v. Wright, 100 Pac. (Ore.) 296, 21 L. R. A. (N. S.) 349, 352;

Hager v. Walker, 107 S. W. (Ky.) 254, 15 L. R. A. (N .S.) 195, 198;

Sallsbury v. Equitable Purchasing Co., 117 Ky. 348, 197 S. W. 813, L. R. A. 1918A, 1114;

State v. Whitcom, 122 *Wis.* 110, 99 N. W. 468, 40 L. R. A. (N. S.) 1208;

Price v. Illinois, 193 Ill. 114, 55 L. R. A. 589, 590;

Winston v. Beeson, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 165;

Ex parte Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588;

State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789;

Scriven v. Lebanon, 99 *Kan.* 602, 162 Pac. 307, L. R. A. 1917C, 462;

Ellis v. Frazier, 38 Ore. 462, 63 Pac. 642, 53 L. R. A. 454;

Ottumwa v. Zekind, 95 Iowa 622, 64 N. W. 646, 29 L. R. A. 734;

Laurens v. Anderson, 75 S. C. 62, 55 S. E. 136;

Colorado Springs v. Siman, —— Col. —— 157 Pac. 194;

Ex parte Richardson, —— Cal. —— 148 Pac. 213, 215;

Moffitt v. City of Pueblo, —— Col. ——, 133 Pac. 754.

It is admitted that the license taxes are prohibitive (Record, pp. 2, 3, 4, 5, 7, 13, 14, 15, 16, 17, Cert. of Corr. p. 1). But even if it were not so admitted, the taxes themselves are so enormous as to lead to the inevitable conclusion that they must necessarily in effect be prohibitive. Being admittedly 84% on fish oil net profits in 1917, and 113.64% in 1918, and 8.18% on fish meal net profits in 1917, and 28.18% in 1918, the taxes involved are comparable with the "1-3 of the net earnings tax" declared by the Supreme Court of Kentucky, in Sallsbury v. Equitable Purchasing Co., to be illegal because of its prohibitive character. That Court said:

> "While the amount of the license as compared with the profits made by those engaged in the taxed occupation cannot be accepted as a true criterion in determining the validity of

> the ordinances in all cases, still, when it is admitted, as is done here, that the license fee exacts practically one-third of the net earnings of the largest business of any individual engaged in the taxed occupation within the taxing district, we cannot get away from the impression necessarily created that the license is prohibitive and, therefore, illegal."
>
> *Sallsbury v. Equitable Purchasing Co.*, 177 Ky. 348, 197 S. W. 813, L. R. A. 1918A, 1114, 1116.

And even though we concede for purpose of argument "That net profits is necessarily a question of economy and efficiency of method," as stated by the learned trial court in his opinion (Record, p. 26), such concession could have no weight on the question before the court because the demurrer admits not only that plaintiff's business "is conducted, and it is necessary to conduct said business on a close and narrow margin of profits" (Record, pp. 2 and 12), but also that neither plaintiff nor any one else "could continue to remain in said business and pay said tax, and if it be required to pay said tax each year plaintiff will be obliged to suspend its operations and cease from said business and industry." (Record, pp. 6, 7 and 17.)

The legislature itself, moreover, by this same act, Chapter 74, Session Laws 1917, supra, apparently deemed that, though a tax on net profits might embrace the question of economy and efficiency of method, such feature was not so vitally ob-

jectionable that taxes should not be laid on a basis under which that factor would necessarily be involved, because it established the license tax on electric light and power plant on a bsis of ½% of the net profits from supplies sold. But even if some other manager could have conducted plaintiff's business so much more economically and efficiently that he would have made twice the net profits which plaintiff made, the license tax that he would have had to pay for the year 1918 on fish oil would have amounted to 56.82% of the net profits. This percentage, moreover, would have been paid, not on the fair method of progression as in the much criticized federal income tax (Atlantic Monthly, July, 1920, p. 112, Reflections on the Income Tax by Bernhard Knollenberg), not on a tremendous income, but on a small business at a flat rate.

We submit that no argument is needed that a business conducted to make money cannot operate and pay a tax of 84% of its net profits, let alone 113.64% thereof. And so far as continuing operation, there is scant difference between taking 113.64% of the net profits or 1000% thereof. The only difference would be as to how much of other assets would be left after selling sufficient of them to pay the excess over 100%.

It being illogical to believe that plaintiff can pay such a tax and continue its business, we must come to the conclusion that the law, if enforced, will not produce any revenue for the Territory,

nor for the federal government, because naturally the non-payment by plaintiff of all license taxes will naturally follow the closing of its business. Hence, the result is, although Congress has legalized plaintiff's business by the Acts of June 6, 1900, and June 26, 1906, supra, under which taxes are paid into the National Treasury to be expended in the Territory (Binns v. U. S., supra), that the local legislature, under an assumption of delegated power, has passed an act which will, if enforced, not only deprive the federal government of the revenue which it would otherwise derive from plaintiff by virtue of the Congressional license taxes under those acts, but which also in actual operation repeals the Congressional Acts, because the territorial act, by the enormity of its license tax, prohibits plaintiff from continuing in the very business which Congress has in effect said plaintiff may conduct; or, to state it another way, the result is that the federal government, which is the grantor of the legislative power, will suffer loss by the acts of the territorial government, which is the grantee of the power, in that, whereas prior to the delegation of the power the grantor received revenue from plaintiff by way of license taxes under the acts of June 6, 1900, and June 26, 1906, supra, since the delegation of the power this revenue is cut off at its fountain-head because, when plaintiff's business is destroyed and it is forced by the territorial act to cease from that business, it will no longer pay, or

be subject to paying its license taxes to the federal government, although those license taxes were specifically kept in force by the identical act (Organic Act of August 24, 1912 [38 Stat., 616]), from which the territorial legislature derives whatever authority it may have to impose any license taxes on the business carried on by plaintiff.

The Ninth Circuit Court of Appeals in the Alaska Pacific Fisheries v. Alaska case said:

> "And thus by the Organic Act those general provisions for the protection of the fish which we find in the act of 1906, were kept in force without possibility of alteration, amendment, or repeal by the Territorial Legislature, and the specific license tax provided by the Act of 1906 was kept in force, * * * *."
>
> *Alaska Pacific Fisheries v. Alaska*, 236 Fed. 52 at 57.

Not only did Congress thus recognize plaintiff's business as legitimate, but Congress by the Act of June 26, 1906, supra, authorized plaintiff to carry on its business in the Territory of Alaska. This conclusion, we believe, is logical, for the reason that the Congressional Acts of June 6, 1900, and June 26, 1906, supra, are not to be confused with the legislation under consideration in the License Tax Cases, 5 Wall. 462, 471, and analogous cases, because in those cases there were two sovereignties involved, a national sovereignty and a state sovereignty; whereas, in the instance case, Alaska, being a territory, as this Court said, in United States v.

McMillan, it has no legislative authority of its own.

> "But it is equally indubitable that Congress, having the entire dominion and sovereignty, national and municipal, Federal and State, over the territories of the United States, so long as they remain in the territorial condition, may itself directly legislate for any territory, or may extend the laws of the United States over it, in any particular that Congress may think fit. As said by Chief Justice Waite, speaking for this court, 'Congress may not only abrogate the laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial Legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the States.' National Bank v. Yankton County, 101 U. S. 129, 133. See also Mormon Church v. United States, 136 U. S. 1, 44; Shively v. Bowlby, 152 U. S. 1, 48, and other cases there cited."

United States v. McMillan, 165 U. S. 504, 510, 511.

See also: *Binns v. United States*, 194 U. S. 486, 491;

Simms v. Simms, 175 U. S. 162, 168.

And as said by Mr. Justice Mathews, speaking for this Court, in Murphy v. Ramsey, viz:

> "The personal and civil rights of the inhabitants of the Territory are secured to them,

> as to other citizens, by the principles of constitutional liberty which restrain all the agencies of the government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States."

Murphy v. Ramsey, 114 U. S. 44.

Inasmuch as Congress has plenary power to legislate for the Territory of Alaska, and may legislate directly in respect to the local affairs of a territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory (Binns v. United States, supra), we urge that Congress not only had the power to, but that it actually did by its acts of June 6, 1900, and June 26, 1906, authorize plaintiff to carry on the fishing business and the manufacture of fish oil and fertilizer (fish meal), in the Territory of Alaska, and that, so long as plaintiff continues to pay the Federal license taxes so imposed upon it by Congress and until the repeal by Congress of its acts, plaintiff holds that right. The language of this Court in the License Cases, supra, is applicable, wherein Mr. Chief Justice Chase said:

> "Thus, Congress having power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, may, without doubt, provide for granting coasting licenses, licenses to pilots, licenses to trade with the Indians, and any other licenses necessary or proper for the exercise of that great and

extensive power; and the same observation is applicable to every other power of Congress, to the exercise of which the granting of licenses may be incident. All such licenses confer authority, and give rights to the licensee."

License Tax Cases, 72 U. S. 462, 5 Wall. 462, 18 L. ed. 496, 500.

And even though Congress be admitted to have only reserved a revisory power over Territorial legislation (Miners' Bank v. Iowa, 12 How. 1, 8, 13 L. ed. 867, 870; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 64, 53 L. ed. 695, 698), such concession is inapposite to this case, because, this is not a case wherein the legislature has first enacted a law and subsequently a contradictory act passed by Congress, but Congress has in effect a law at the time of its delegation of powers to the Territorial Legislature, which Congress said the Territorial Legislature should not amend, modify, alter or repeal, and; if in this instance, the territory may so repeal the Congressional act then it would follow that a repeal by the legislature of the entire Alaska Organic Act would not be null and void unless Congress took some affirmative action to so declare such territorial enactment.

If this were a question where under authorized police power the Territorial Legislature had destroyed plaintiff's business because it was a public nuisance or had under such power laid restrictions upon the business which resulted in a prohibition or destruction of the business, we realize that the sit-

uation might be somewhat different, but no such question is presented. Instead, this is a case where unoffending property is taken away without due process of law from an innocent owner.

This Court has held there is a distinction between these two cases.

> "The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."
>
> *Mugler v. Kansas*, 123 U. S. 623, 669, 31 L. ed. 205.

There is no federal or territorial law proscribing plaintiff's business as a nuisance. On the contrary, the demurrer admits that it is a "useful, legitimate, and commendable business and industry and is of use and value to the economic, industrial, and commercial welfare of the Territory of Alaska and the United States of America," and that it produces valuable and useful products including "fish oil, fish meal, fertilizer, glycerine, salt fish and by-products." (Record, pp. 1, 2, 12 and 13.) Hence, the legislature may not, under the guise of protecting the public interests, arbitrarily interfere with, or impose unusual and unnecessary restrictions upon that business.

Lawton v. Steele, supra.

X.

A CLASSIFICATION CANNOT BE SUSTAINED WHICH IS BASED UPON A POLICE REGULATION WHERE THE OBJECT SOUGHT TO BE ACCOMPLISHED IS OSTENSIBLY THE RAISING OF REVENUE, AND TO SUSTAIN IT WOULD BE EQUIVALENT TO DECLARING IT LEGAL UPON A BASIS AND FOR A REASON THAT DOES NOT EXIST IN FACT.

Granting, for argument's sake, the correctness of the statement of the learned trial court, i. e.: "It is a well known fact that the salmon feeds largely on the herring" (Record, p. 29), we submit that such concession would not afford a ground for an arbitrary, confiscatory, and destructive classification of plaintiff's business, because, in the first place, it is logical to assume that Congress would be as well advised thereof as the Territorial Legislature and, if Congress considered it an evil for plaintiff to use herring in its business and thereby deprive salmon fish of being able to feed thereon, it is not likely that Congress would have recognized plaintiff's business as a legitimate industry for the past twenty years, nor would have Congress by the Organic Act (38 Stat., 616) expressly reserved the power from the local legislature of cor-

recting such evil; and, in the second place, such set of facts has no logical relation to the ostensible object sought to be accomplished by the Territorial Legislature in its acts under question.

The similarity and method of levying or laying the tax by the Alaska Legislature as compared to the method of laying the taxes levied by Congress under the Acts of June 6, 1900 (31 Stat., 331), and June 26, 1906 (34 Stat., 478), will be immediately noted, and it would, therefore, seem that the Territorial taxes are, at least ostensibly, the same kind of taxes as the Congressional taxes, in fact, the Territorial Legislature presumably laid them under the limitation in Section 3 of the Organic Act (38 Stat., 616), that "provided, further, that this proviso shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

This Court in Binns v. United States, in speaking of the Act of June 6, 1900 (31 Stat. 331), said:

> "For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes."
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> *Binns v. United States*, 194 U. S. 491, 492, 493, 494.

The Ninth Circuit Court of Appeals, when Chapter 76, Alaska Session Laws, 1915, was before it, said:

> "It is plain, we think, that our conclusions should be arrived at by assuming that the great object of the legislative act of April 29, 1915, quoted above, was to create revenue, and that in its scheme of licenses taxes the Legislature had in mind provision for the expense of administration of the Territory."
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> *Alaska Pacific Fisheries v. Alaska*, 236 Fed. 52, 55.

Inasmuch as Chapter 74, Alaska Session Laws, 1917, is practically in form similar to Chapter 76, Alaska Session Laws, 1915, we consider it safe to say that, taken as a whole, the primary and ostensible object of the legislature when enacting that act was to raise revenue. So far as plaintiff is concerned, as we have seen, admittedly no revenue will be raised by the act because plaintiff is prohibited by the tax from carrying on its business and it is subject to no license tax, either Federal or Territorial, if it does not produce a product. (Record, p. 15, Cert. of Corr. p. 1.)

But, if the object of the act was to raise revenue, then the legislature could not base its classification of plaintiff's business upon a conceived state of facts that by plaintiff's use of the herring the salmon fish were deprived of their natural food, and, because of this resultant harm or injury, discriminate against plaintiff's business as an evil busi-

ness and therefore one to be prohibitively taxed, for the reason that classification necessarily is dependent upon the object in view (Tanner v. Little, supra) and, if that object is revenue, the classification cannot be made to hinge upon police supervision. Otherwise, the legislature would have authority to pass an act for the ostensible purpose of raising revenue, but to use the act to regulate or entirely prohibit, and this Court has said that the corollary of this may not be done, viz.:

> "To uphold it in such a case as this is to say that it may be passed for one purpose and used for another, passed as a police inspection measure and used for the purpose of raising revenue, that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue, and yet because it is said to be an inspection measure the Court must take it as such, and hold it valid, although resulting in a rate of taxation, which, if carried out through the country would bankrupt the company were it added to the other taxes properly assessed for revenue and paid by the company. It is thus to be declared legal upon a basis and for a reason that does not exist in fact."
>
> *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64, 72.

A discrimination, based on the theory that plaintiff should be prohibited by enormous tax from using herring because the latter are food for salmon, we respectfully submit could have no relation to an objective of raising revenue, but, in fact, could only

relate to such an object or purpose as it is admitted was the real intent of this legislation, namely, the prohibition of the plaintiff's business. Having no relation to the ostensible object of raising revenue, a discrimination based upon that fact is unconstitutional even though the selection might not be obviously unreasonable and arbitrary.

This Court has said:

> "Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."
>
> *Atchison &c. R. Co. v. Mathews*, 174 U. S. 74, 105.

There are many other decisions of this Court so holding. Inter alia:

Mugler v. Kansas, 123 U. S. 623, 661.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 560, 561;

Gulf &c, Ry. v. Ellis, 165 U. S. 150, 155, 159, 160, 165;

Cotting v. Kansas City Stock Yards Co., supra;

Magoun v. Illinois &c. Bank, 170 U. S. 283;

American Sugar &c. Co. v. Louisiana, 179 U. S. 89;

Austin v. Tennessee, 179 U. S. 343, 344;

Booth v. Illinois, 184 U. S. 425, 429, 46 L. ed. 623, 626;

McLean v. Arkansas, 211 U. S. 539, 547, 548, 53 L. ed. 315, 319, 320, 29 Sup. Ct. Rep 206.

XI.

A CLASSIFICATION, REGARDLESS OF WHETHER REASONABLE OR LOGICAL, CANNOT BE SUSTAINED WHERE IT IS MADE FOR THE PURPOSE OF PROHIBITING A BUSINESS WHEN THERE IS AN ABSOLUTE WANT OF AUTHORITY TO PROHIBIT THAT BUSINESS, AND SUCH CLASSIFICATION IS VOID.

Assuming, however, that the Territorial Legislature considered it an evil for plaintiff to use herring in its business because the herring would otherwise constitute a food for salmon, and that for that reason the legislature could so classify plaintiff's business for revenue purposes that prohibitory taxes would fall upon it, then it is equally true, should the legislature consider it an evil to catch salmon for canning purposes in Alaskan waters during any year or at any time, the legislature could, with a view of preserving that species of fish from diminution by prohibiting the catching of them during those periods, lay a tax on each case of salmon enormous enough to absolutely prohibit any one from catching or canning any salmon whatsoever, and thereby accomplish by means of a prohitive

tax, laid under the guise of a revenue measure, an object for whose accomplishment it was without legislative power. And, if the legislature did lay such an enormous license tax on each case of canned salmon that every one was absolutely prohibited from catching and canning salmon, could it be said with sincerity that the legislature had not thereby in effect altered, amended, modified and repealed the "fish laws of the United States applicable to Alaska?" Again, if the legislature can thus indirectly prohibit the fishing business in Alaska, why can it not directly prohibit plaintiff from continuing its business, instead of taking the roundabout method of a confiscatory license tax?

The answer is necessarily contained in the fact that the legislature realized that there was another essential element to be considered in the exercise of its legislative functions, namely: authority, because:

> "Of course, an element to be considered is the authority of the legislature over the subject matter. * * * *"

Rast v. Van Deman & Lewis Co., supra.

Whatever express authority the legislature had to lay a license tax upon the business conducted by plaintiff is doubtless based upon the limiting clause in Section 3 of the Organic Act of August 24, 1912 (38 Stat., 616), "provided, further, that this proviso shall not operate to prevent the legislature from

imposing other and additional taxes or licenses." This proviso would not warrant the legislature in imposing taxes or licenses so enormous as to be prohibitory, because, regardless of whether this is a limitation or a grant of authority, a grant to impose fees for the purpose of revenue does not warrant the enactment of prohibitive legislation thereunder, and, if it did, it would present a paradox, in that, the purpose for which the grant was authorized would be used for the purpose of defeating its very ends, and would result in no revenue being produced, or, as stated in Cooley on Taxation, 2nd ed., 597, 598:

> "If a revenue authority is what seems to be conferred the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purpose of revenue would not warrant their being made so heavy as to be prohibitive."

The consideration of this element of authority brings us to the clearly demonstrable proposition that the Territorial Legislature was entirely without authority to enact legislation which has the effect of prohibiting plaintiff's business, because in so doing it unquestionably either modifies, amends, alters, or repeals the Congressional Acts of June 6, 1900, and June 28, 1906, supra, the modification, amendment, alteration and repeal of which Con-

gress expressly inhibited in the Organic Act of August 24, 1912, supra.

If the legislature has power under the clause:

> "Provided, further, that this proviso shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

to do these things and thereby alter, amend, modify, or repeal the "fish laws" or the "laws providing for taxes on business and trade," it can scarcely be refuted that the legislature also has power by virtue of the proviso to alter, amend, modify or repeal the customs, internal-revenue, postal, game, fur-seal, fur-bearing, and other general laws of the United States applicable to Alaska, because the limitations against these latter classes of laws are the same as against the "fish laws" or "laws providing for taxes of business and trades," for said Section 3 of the Organic Act of August 24, 1912 (38 Stat., 616), supra, makes one general limitation against modifying, repealing, altering or amending all these laws, in the following language:

> "That except as herein provided all laws, now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature: Provided, That the authority herein granted to the Legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applica-

ble to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled, 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools and the care and support of insane persons in the District of Alaska and for other purposes, approved January twenty-seven, nineteen hundred and five, and the several Acts amendatory thereof.'"

To illustrate what might occur if the Territorial Legislature has such power:

There are postoffice clerks and employees in many of the postoffices of the larger Alaskan towns. Suppose, the local legislature under the proviso for imposing other and additional taxes or licenses, should lay a tax of $2,000 per annum on the occupation or business of being a postoffice clerk, and that the postoffice department was, as it would necessarily be, thereby prevented from employing clerks in the Territory, resulting in that department's being unable to conduct its business. Would it be said for a moment that the legislature had not usurped the power of Congress, or that it had not, in effect, altered, amended, modified or repealed the postal laws? The same illustration may be used with the customs. Or, again suppose a prohibitory license tax was placed on the occupation of killing seals, and that the federal government was thereby prevented from employing any one in the Territory to make the annual kill of seal on the Pribiloff Islands. Would that not be in effect a repeal of the

fur-seal laws? Probably many more practical examples could be given to show that if the power to impose other and additional taxes or licenses is unlimited that the Territorial Legislature could enact such prohibitory license taxes as to thereby alter, modify, amend or repeal the very classes of laws which Congress has said it should not alter, modify, amend or repeal. But if the Legislature should so attempt to alter, amend, modify or repeal the customs, internal-revenue, postal and fur-seal laws, or laws relating to fur-bearing animals, the law would fall of its own absurdity as it would be equivalent to giving the agent a legislative discretion superior to its principal; the dependency a power at least equal to, if not greater than, its sovereign, although, as said by this Court, speaking by Mr. Justice Bradley, in Snow v. United States:

> "The government of the Territories of the United States belongs, primarily, to Congress; and, secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupilage as Territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government."
>
> *Snow v. United States*, 18 Wall. 317, 85 U. S. 317, 21 L. ed. 784, 785.

It may be asked then: What did Congress mean when it said the Territorial Legislature might impose other and additional licenses and taxes?

To us it appears highly improbable that Congress thereby meant that the Territorial Legislature had power to pass an enactment prohibiting the District Court for Alaska from any longer collecting the license taxes provided by either the Acts of March 3, 1899, June 6, 1900, or June 26, 1906, or eliminating any of the trades and businesses listed in any of those acts from paying the license tax therein provided. Such, however, is the result of the legislation actually enacted, because the demurrer admits that plaintiff will be put out of business (Record, pp. 4, 7, 15, 17, Certificate of Correction, p. 2) if it be compelled to pay the Territorial tax, and, if plaintiff be put out of business, it is self-evident that it will no longer produce fish oil or fish meal, and, therefore, will not pay any license tax on those products under the federal acts to the District Court. Thus, by indirection, the Territorial legislation has as effectually amended, modified, altered and repeal the laws of the United States providing for taxes on business and trade and the fish laws of the United States, so far as the business engaged in by plaintiff is concerned, as though the legislation had in express words said: No license tax shall be hereafter paid by, nor shall the District Court hereafter collect any license tax from, persons manufacturing fish oil and fish meal in Alaska.

While we do not believe that the proviso meant, as was held in Alaska Pacific Fisheries v. Alaska,

236 Fed. 57, that the Territorial Legislature might impose license taxes on the same businesses, trades or occupations additional to those already imposed by Congress, it does seem probable that Congress realized that the Territorial legislature would notice that there were many lines of goods, articles of commerce, businesses and trades in Alaska on which no license tax was laid by Congress by either of the Acts of June 6, 1900, or June 26, 1906, supra, but which should pay and on which the legislature should have the power to lay a license tax, not only in fairness to the Territory, but also in fairness to those businesses or trades which were already bearing part of the expenses of the Territory by paying a license tax under the Congressional acts, and, in order to clearly show that it did not intend to take away that power, inserted this proviso as a limitation upon its own limitation as to the powers given the Legislature. There were many such, as a comparison of the Congressional Acts with the Territorial acts will show. Among them, to mention a few, were laundries, meat markets, bakeries, employment agencies, telephone companies, public scavengers, and public messengers. But, assuredly Congress did not intend that the Territorial Legislature might impose other and additional licenses and taxes on the same businesses and trades on which Congress had laid license taxes by the acts of June 6, 1900, and June 26, 1906, supra, so confiscatory and enormous as to prohibit the conduct of those businesses

or trades, because it is not logical that the sovereign legislature, having just expressly limited the power of the dependent legislature as not extending to amending, modifying, altering or repealing the very laws by which those Congressional license taxes were laid, would in the same breath add a proviso removing the restriction just laid and authorizing the local legislature to levy such an enormous, prohibitory, and confiscatory tax that the collection thereof would amend, modify, alter or repeal those same laws relating to businesses and trades.

And we submit that the Territorial act must be held void as to plaintiff because the Territorial Legislature had no authority to deal with that at which the legislation was aimed, because, while it is true that:

> "The preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught have been repeatedly upheld by the courts."
>
> *Lawton v. Steele*, 152 U. S. 133, 138, 38 L. ed. 385.

Congress has expressly reserved this power to itself in the Organic Act of August 24, 1912, 38 Stat. L. 616, as hereinbefore noted. This reservation is not inconsistent with the reservation of almost equal

scope in the general act relative to territories, viz: the Act of June 30, 1886, 24 Stat. L. 170, providing:

> "That the legislature of the territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * the protection of game or fish, * * *"

The Legislature itself at the same session at which it laid the prohibitive tax on plaintiff's business recognized its limitations of power in respect to the "fish laws," and, if we may be permitted to refer thereto, passed Senate Joint Memorial No. 5, Alaska Session Laws 1917, p. 231, and, after referring to House Bill 17499 introduced August 18, 1916, by Representative, now Secretary of Commerce, Alexander, petitioned:

> "And we would further appeal to Congress to grant the people of Alaska the right to control and regulate our own fisheries."

Hence, these prohibitory taxes must be void and null; otherwise, the anomaly exists that the Territorial Legislature may, under its police power, exercise control over the fisheries laws of Alaska enacted by Congress, although the power to do so is expressly withheld from it, by subterfuge and indirect method of laying a prohibitory license tax thereon under its delegated power to impose other and additional license taxes but for the purpose of regulating the business out of existence.

And, regardless of whether the classification of the manufacture of fish oil and fish meal from herring in whole or in part as distinguished from the manufacture of fish oil and fish meal from any other kind of fish, is a logical, appropriate, or scientific classification, if there was a want of authority in the Territorial Legislature to make the classification, it cannot be sustained.

This Court has directly passed on this proposition, viz.:

> "If there is no such authority, a classification, however logical, appropriate ,or scientific, will not be sustained."
>
> *Tanner v. Little*, 240 U. S. 369, 383, 60 L. ed. 691, 701.

We respectfully urge that plaintiff is well warranted, in the light of the conceded fact that the tax on its business is an arbitrary and confiscatory tax, in earnestly beseeching this Honorable Court to carefully consider whether or not plaintiff has not been deprived of inherent and fundamental constitutional rights by the Territorial Legislature in the guise of a tax for revenue but in reality for the purpose of taking away those rights under the mistaken theory that the judicial power will say that there is no express authority for the judiciary to protect them. In other words, that the case has now arisen and is presented in this case, wherein the language of Mr. Chief Justice White in Knowlton v. Moore is clearly applicable, namely:

> "If a case should ever arise where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so."
>
> *Knowlton v. Moore*, 178 U. S. 41, 109, 110; 44 L. ed. 969.

It therefore seems that this case presents admitted facts clearly disclosing that the Territorial Legislature has not only usurped the power delegated to it by Congress, but that it has gone further and enacted legislation aimed at the prohibition of the making of fish oil and fish meal from herring in whole or in part (Record, p. 15, Certificate of Correction, p. 1.). If such be the fact, then the legislation is void, because there was no legislative authority to deal with that at which the legislation was aimed.

> "The statute was held void because there was no authority to deal with that which the legislation was aimed."
>
> *Tanner v. Little*, 240 U. S. 360, 388, 60 L. ed. 691, 701.
>
> *Truax v. Rich* 239 U. S. 33, 60 L. ed. 131.

Otherwise, we have a case where taxation has been used indirectly to accomplish the confiscation of plaintiff's property and the prohibition of its business, although the legislature has been express-

ly inhibited from exercising the power of taking that property without compensation and from prohibiting that business, regardless of whether it might believe that action for the public good. This, we submit, is supported by no decisions of this or any other court.

> "Doubtless, whenever property may be taken outright by the government without compensation, or where an occupation may be prohibited for the public good, the power of taxation may be resorted to, to accomplish the same results. All the cases where confiscatory taxation have been upheld are of this character. Where the right of confiscation or of prohibition does not exist upon other grounds, it is believed that taxation may not be used indirectly to accomplish such results."
>
> Const. Law, 12 Am. L. & P., p. 198 (by Prof. James Parker Hall, Chicago University.)

And the principle announced by this Court in Rast v. Van Deman & Lewis Co., 240 U. S. 342, 357, 60 L. ed. 679, 687, viz:

> "It is established that a distinction in legislation is not arbitrary, if any state of facts can be reasonably conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed."

does not obviate the conclusion that an arbitrary distinction has been made in the case at bar, because the facts so to be or thus conjectured must bear upon the object which the legislature had in

view when it enacted the tax (Tanner v. Little, supra), and no state of facts can be conceived in this case logically bearing on the purported object of revenue, but they all relate to a prohibitory purpose, and it is essential that a lawful authority must exist to warrant the Legislature prohibiting the plaintiff's business, either by police regulation or by prohibitory tax, otherwise the legislation would be enactment which the Legislature had no power to make.

XII.

THE WANT OF POWER OF THE TERRITORIAL LEGISLATURE TO PROHIBIT PLAINTIFF FROM CONDUCTING ITS LAWFUL BUSINESS DOES NOT INTERFERE WITH THE POLICE POWER OF THE TERRITORY BECAUSE THAT POWER MUST BE EXERCISED SUBSERVIENT TO THE CONSTITUTION.

The lack of authority of the Territorial Legislature to prohibit plaintiff's business does not interfere with whatever police power the Territory may hold, because even police power must, in its exercise, be subservient to the Constitution and it is limited by that instrument.

Mr. Justice Peckham, speaking for this Court, in Allgeyer v. Louisiana, said:

"To deprive the citizen of such a right as

herein described"—the right to contract outside the state for insurance on his property—"without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendant had a right to perform. This does not interfere in any way with the acknowledeged right of the State to enact such legislation in the legitimate exercise of its police or other power as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution."

Allgeyer v. Louisiana, 165 U. S. 578, 591.

And the like principle was stated by Mr. Justice Day, in speaking for this Court, in McLean v. Arkansas:

"It is also true that the police power of the state is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution. * * * * If there existed a condition of affairs concerning which the Legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail."

McLean v. Arkansas, 211 U. S. 539, 547,

548, 53 L. ed. 315, 319, 320, 29 Sup. Ct. Rep. 206.

Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L. R. A. 1915 C, 960.

But none such evils exist in plaintiff's business as might have been conjectured in many of the cases where a business has been prohibited by an exercise of the police power, for instance: Billiard room, Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L. R. A. (N. S.) 153, 32 Sup. Ct. Rep. 697; trading stamp business with seductive advertising, Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, Pitney v. State, 240 U. S. 387, 60 L. ed. 703, Rast v. Van Deman & Lewis Co., 240 U. S. 342, 60 L. ed. 679; selling 8 ounces lard as though 3 full pounds, Armour & Co. v. North Dakota, 240 U. S. 510, 515, 60 L. ed. 771; manufacture or sale of intoxicating liquor, Mugler v. Kansas, 123 U. S. 623; fires after certain hours in laundries in city largely composed of frame structure, Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 924; use of Flag for advertising purposes, Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696; and involves no injury to health, or adulteration of dairy products, or fraud in their sale, Powell v. Pennsylvania, 127 U. S. 684, and produces no discomfort or sickness nor operates as a nuisance, Fertilizing Co. v. Hyde Park, 97 U. S. 659, 667.

On the contrary, it is admitted that "plaintiff's business is a useful, legitimate and commend-

able business and industry and is of use and value to the economic, industrial and commercial welfare of the Territory of Alaska and the United States" (Record, pp. 1 and 12, Certificate of Correction, p. 1.)

Even if it were not so admitted, if it be termed a "fishery" business, which is apparently the general classification accorded it by Congress, inasmuch as Congress by the Act of June 26, 1906, 34 Stat., 478, specifically brought the business within that Act which is an Act for the protection of the fisheries of Alaska, it undoubtedly is a lawful business, open to all, unless some specific statutory ban has been laid upon it, because at common law the right of fishing in navigable waters was common to all.

> "In State v. Roberts, 59 N. H. 256, which was an indictment for taking fish out of navigable waters out of the season prescribed by statute, it was said by the Court: 'At common law the right of fishing in navigable waters was common to all.'"
>
> *Lawton v. Steele*, 152 U. S. 133, 138.

See also:

> *Shively v. Bowlby*, 152 U. S. 1, 11; 38 L. ed. 331;
>
> *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248;
>
> *Martin v. Waddell*, 16 Pet. 376, 10 L. ed. 997.

Should it be termed a fertilizer business. be-

cause plaintiff manufactures fish oil, fish meal and fertilizer, still it has at least the rights accorded slaughter houses, and such institutions have been accorded many rights, even in centers of congested population, whereas plaintiff's business is located in an isolated village inhabited by the few whites and Indians who are its employees and situated far from the crowded marts of trade.

Butchers' Union &c., Co. v. Crescent City &c. Co., 111 U. S. 746, 757, 28 L. ed. 585, 590, 591.

But, as we have seen, Congress not only threw its protecting arm about the business by restricting, in the Organic Act (38 Stat. 616), the Territory from amending, modifying, altering or repealing the Act of June 26, 1906 (34 Stat., 478), being one of the "fish laws of the United States applicable to Alaska," but also has itself recognized plaintiff's business as a lawful business for a period of more than twenty years, first, by licensing it by the act of June 6, 1900 (31 Stat., 321, 330), and later by passing no prohibitive or restrictive legislation against it.

And though there may lie, between the useful businesses which may be regulated and the vicious and harmful businesses which may be prohibited, many nonuseful occupations which may, or may not be harmful according to local conditions or the manner in which they are conducted, yet that fact does not afford reason for prohibiting plaintiff's

business because by the admitted facts it is placed in the category of a legitimate, useful and commendable business. As such it possibly, disregarding for the moment the limitations upon the Territory's legislative power, might be subject to regulation, because this Court has said:

> "The 14th Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location may prove injurious or offensive to the public."
>
> *Murphy v. California*, 225 U. S. 623, 628, 56 L. ed. 1229, 1232, 41 L. R. A. (N. S.) 153, 32 Sup. Ct. Rep. 697.

This concession, however, does not constitute a reason adequate to justify the prohibition and destruction of an admittedly "legitimate, useful and commendable business" such as plaintiff's even though it might be conceived that abuses might spring up therein, for, as said by this Court in Adams v. Tanner:

> "Because abuses may, and probably do, grow up in connection with this"—employment agency—"business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in any upright way. Certainly, there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earn-

> estly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent public condemnation of any one of them by the public. Happily, for all, the fundamental guarantees of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked. * * * * We are of opinion that Initiative Measure No. 8, as constructed by the supreme court of Washington, is arbitrary and oppressive, and that it unduly restricts the liberty of appellants, guaranteed by the 14th amendment, to engage in a useful business."
>
> *Adams v. Tanner*, 244 U. S. 590, 594, 61 L. ed. 1336, 1343.

Such conclusion is not contrary to the decisions of this Court in the three cases of Rast v. Van Deman & Lewis Co., Tanner v. Little, and Pitney v. State, supra, because in those cases it could be reasonably conjectured that the business was harmful to the public good, and hence there was a proper exercise of police power not subject to judicial review.

The Supreme Court of Kansas apparently so understood those decisions as, in a comparatively recent case, it said:

> "On March 6, 1906, two statutes quite similar to those which had been so generally condemned were upheld by the Federal Supreme Court in a series of unanimous opinions, on the ground that they were enacted under a proper exercise of the police power,

and that the decision of the legislative body that the use of trading stamps is harmful to the public is not subject to judicial review."

Kansas v. Wilson, 101 Kan. 789, 168 Pac. 679, L. R. A. 1918B, 374, 377.

XIII.

A CHARGE IMPOSED FOR POLICE SUPERVISION MUST BEAR A RELATION TO THE EXPENSE OF THE SUPERVISION AFFORDED, OTHERWISE IT IS NOT CONSTITUTIONAL.

The pleadings admit that "the tax is greatly in excess of the reasonable and necessary cost of any license or regulation whatsoever that could reasonably be required to be exercised over" plaintiff's business and that the "cost of regulating and supervising, and of issuing licenses for" plaintiff's business "is and would be, and has been, no greater than that of any of the other businesses or industries for which licenses are provided in said acts, but that plaintiff's said industry is arbitrarily, capriciously and unjustly taxed many times more than, i.e., a percentage many times larger than that levied on any other business in the Territory and that said Territory has, and had, no authority or power under its police power, either implied or otherwise, to impose said tax" and that, as a matter of fact, "no regulation or police supervision whatsoever over said business or industry is required or needed, or furnished therefor or thereto

by said Territory." (Record, pp. 5, 19; Certificate of Correction, p. 2.)

While this Court in Atlantic &c. Tel. Co. v. Philadelphia, said, in substance, that a municipality is not bound to furnish police supervision for nothing, and might, in addition to ordinary property taxation, subject the corporation to a charge for the expense of the supervision, yet it further added, Mr. Justice Peckham speaking for the Court:

> "But it does not follow from this that a municipality is not subject to any restraint in the amount of the charge which it so exacts. True it is often said that a license tax is in its nature arbitrary; that it is not necessarily graduated by the value of the property invested in the business licensed or its profitableness. But such observations are pertinent only in case the license is resorted to for the purpose of revenue. When it is authorized in support of police supervision, the expense of such supervision determines the amount of the charge, and if it were possible to prove in advance the exact cost, that would be the limit of the tax."
>
> *Atlantic &c. Tel. Co. v. Philadelphia*, 190 U. S. 160, 164:

See also:

Postal-Tel. Cable Co. v. Taylor, 192 U. S. 64, 72, 73;

Foot & Co. v. Stanley, 232 U. S. 505, 58 L. ed. 698, 702;

People v. Wilson, 249 Ill. 195, 94 N. E. 141, 35 L. R. A. (N. S.) 1074;

State v. Moore, (N. C.) 22 L. R. A. 472.

Hence, the imposition cannot be sustained as a police supervision fee even though the legislature were conceded to have authority to supervise plaintiff's business as a matter of police power, because it is, as we have just seen, admitted that the charge is many times larger than the expense of any possible supervision and that in fact no supervision is furnished.

XIV.

THE TERRITORIAL LEGISLATION AND TAXES IMPOSED THEREBY BEING VIOLATIVE OF THE FEDERAL CONSTITUTION, IT FOLLOWS THAT THEY ARE VIOLATIVE OF THE ALASKA ORGANIC ACT.

The Territorial legislation and the taxes imposed thereby are necessarily violative of the Organic Act in the same respects that they are violative of the Federal Constitution, because Congress expressly enacted that "the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States" (Sec. 3, Organic Act [38 Stat., 616]), and that "the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution

and laws of the United States, x x x and all laws passed, or attempted to be passed, by such Legislature in said Territory inconsistent with the provisions of this section shall be null and void." (Sec. 9, id.)

XV.

THE TERRITORIAL LEGISLATION AND TAXES IMPOSED THEREBY ARE ALSO CONTRARY TO THE ALASKA ORGANIC ACT BECAUSE THEIR EFFECT IS TO AMEND, ALTER, MODIFY AND REPEAL THE CONGRESSIONAL ACTS OF JUNE 6, 1900 (31 Stat., 321), and JUNE 26, 1906 (34 Stat., 478).

The Territorial legislation and the taxes imposed thereby also are contrary to the Alaska Organic Act (38 Stat., 616) on other than simply Federal Constitutional grounds, and the jurisdiction of this Court, having been invoked upon substantial grounds of Federal law, extends to the determination of those questions.

This principle is supported by a recent decision of this Court, viz:

> "Of course, the Federal jurisdiction, having been invoked upon substantial grounds of Federal law, extends to the determination of all questions involved in the case, whether resting upon state or Federal law."
>
> *Louisville N. R. Co. v. Greene*, 244 U. S. 522, 527, 61 L. ed. 1291, 1298;

Siler v. Louisville & N. R. Co., 213 U. S. 175, 191, 53 L. ed. 753, 29 Sup. Ct. Rep. 451;

Ohio Tax Cases, 232 U. S. 576, 586, 58 L. ed. 737, 743.

These other questions involved the proposition that the legislation is plainly contrary to and inconsistent with the express limitations of the Organic Act (38 Stat., 616), and, hence, null and void.

The first of these questions we have already discussed (supra pages 83, et sequitur,), namely, that the legislation in effect amends, alters, modifies and repeals the fishing laws of the United States applicable to Alaska (34 Stat., 478) and the laws of the United States providing for taxes on business and trade in Alaska (31 Stat., 321). We will not therefore further discuss it, other than to add, perhaps at the expense of reiteration, that it is admitted that the Territorial legislation is so prohibitive that plaintiff will be compelled to cease from carrying on its business if the taxes thereby imposed against it be collected (Record, pp. 6, 15 and 17; Certificate of Correction, p. 1); that plaintiff's business was recognized as legitimate by both the Acts of Congress of June 6, 1900 (31 Stat., 321), and of June 26, 1906 (34 Stat., 478); that both of said Acts exacted a license tax from plaintiff and that plaintiff does and will continue to pay a license tax under the latter act, as

it superceded the former act in that respect, so long as it continues in business; that the Act of June 26, 1906, is the act expressly enacted by Congress for the protection of the fisheries of Alaska, and that Congress thereby threw a protective arm about plaintiff's business when it reserved from the Territorial Legislature any authority to amend, modify, alter or repeal that Act; that when plaintiff is so compulsorily forced to cease its business by the Territorial legislation, then it will no longer pay any Federal license taxes under the Act of June 26, 1906; thence, the effect is the same as though the Territorial Legislature had expressly repealed the Congressional Act of June 26, 1906, as well as the former Act of June 6, 1900, because in either event a nonpayment of the Federal tax will result, depriving the Federal government of that revenue, and effacing the recognition given plaintiff's business by Congress.

XVI.

THE TERRITORIAL LEGISLATION AND TAXES IMPOSED THEREBY ARE ALSO CONTRARY TO THE ALASKA ORGANIC ACT, BECAUSE THEY ARE NOT UNIFORM UPON THE SAME CLASS OF SUBJECTS AND ARE NOT LEVIED AND COLLECTED UNDER GENERAL LAWS; THE ASSESSMENTS ARE NOT ACCORDING TO ACTUAL VALUE, IN FACT NO AS-

SESSMENTS WERE MADE; AND THE TAXES, ALTHOUGH LEVIED FOR TERRITORIAL PURPOSES, ARE IN EXCESS OF ONE PER CENTUM PER ANNUM OF ANY POSSIBLE VALUATION WHICH COULD BE LAWFULLY ASSESSED UPON THE ACTUAL VALUE OF THE PROPERTY ON WHICH THEY ARE LEVIED.

The remaining questions to be discussed involve, what possibly might be termed, the method and basis under and upon which the levy is made, and disclose a plain violation of the express provisions of Section 9 of the Organic Act, both in spirit and in letter, wherein that Section reads:

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; x x x x and all laws passed, or attempted to be passed, by such legislature in said Territory inconsistent with the provisions of this section shall be null and void."

(a) The tax in question is a property tax.

It has been said that it is sometimes difficult to distinguish between a tax and a license, but there can be no refutation that this imposition is a tax because its object, as a whole is to raise revenue and it is a charge or burden imposed for the support of the government. It will be noted that the

legislation in question not only is ostensibly for raising general revenue for Territorial purposes, but also that no privileges are granted to the plaintiff, and that, while it is made a misdemeanor punishable by fine and imprisonment, if the fine is not paid, a civil action is also provided for the recovery of the taxes. It is thus easily distinguishable from a license which is simply a permission to do what would otherwise be unlawful and has as its primary object the granting of some privilege or the imposing of some restraint .(Reser v. Umatilla Co., 86 Pac. [Ore.] 595, 597.)

The question, however, as to the nature of the imposition is undoubtedly settled by the controlling decision in Binns v. United States, 194 U. S. 491, because of the similarity in the method of procedure between the Territorial legislation in question and the Congressional enactment under consideration by this Court in that case, and there can be little contradiction that the imposition is primarily a tax, and not a license.

Such concession is not inapposite to the conclusion, however, that the tax as a matter of fact is a property tax. "There have been many fluctuations of opinion upon the question as to whether a privilege tax is a tax upon property" (Gulf and Ship Island Rd. Co. v. Hewes, 183, U. S. 66, 77), but the decisions of this Court have apparently settled beyond all controversy that a license tax on the occupation of doing a business is a tax on the

business carried on, and that a tax on the business carried on is a tax on the property; hence, that "a tax on the seller of goods is a tax upon the goods themselves." Kehrer v. Stewart, 197 U. S. 60, 65.

This Court has also said:

> "Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business. x x x It is a parallel with the case of Brown v. Maryland, 12 Wheat, 419. That was a tax on an occupation, and this Court held that it was equivalent to a tax on the business caried on,—(The importation of goods from foreign countries),—and even equivalent to a tax on the imports themselves, and therefore contrary to the clause of the Constitution which prohibited the states from laying any import. x x x 'And the Court decided that this state law (the Maryland land law under consideration in Brown v. Maryland) was a tax on imports, and the mode of imposing it, by giving it the form of a tax on the occupation of the importer, merely varied the form in which the tax was imposed, without varying the substance.'"
>
> *Leloup v. Port of Mobile*, 127 U. S. 640, 645, 646, 647.

See also:

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347;

Brown v. Maryland, 12 Wheat 419, 6 L. ed. 678.

It follows that a tax on the business of carry-

ing on a fish oil or fish meal works, or of manufacturing fish oil and fish meal, is a tax on the goods or product manufactured, namely: fish oil and fish meal.

A very similar tax was before the Supreme Court of Mississippi, in which a tax of a certain amount per cup or box was laid for the privilege of carrying on the business of extracting turpentine from standing trees, and that Court held that the tax was a property tax, and, hence, being inconsistent with the uniformity clause, was null and void (Thompson v. McLeod, 112 Miss. 383, 73 So. 193, L. R. A. 1918C, 893, 897), and this Court, in Gulf & Ship Island Rd. Co. v. Hewes, supra, held that it was well settled that the law of this Court is that a tax on railroad franchises is a tax on property.

(b) License taxes are subject to Constitutional limitations when there is no express exemption therefrom, and peculiarly so when considered as property taxes.

It would therefore appear that the imposition is a property tax and must come within the limitation of the Organic Act (38 Stat., 616) that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws," and that such would be the case even were it denominated a license tax because the substance, not the form, is the vital factor, and the

substance is subject to the limitations of the Organic Act; the same as the tax under discussion in Welton v. Missouri, supra, was held null and void because the state had legislated upon a subject which was reserved to Congress, that is, enacted a tax which was inconsisent with the limitations of its authority as imposed or reserved by the Federal Constitution.

It seems as though this also would be true even were it not in fact a property tax for Congress has used the strongest possible language when it said "all taxes shall be uniform upon the same class of subjects." It can scarcely be conceived what further words could have been added to bring within its scope such a tax as the one in question if the words "all taxes" fail to do so. "All" is a word of boundless expression; of such unlimited breadth that nothing more can be joined to it. Whereas, if Congress had intended that this proviso should not apply to license taxes, it could easily have inserted the words, which otherwise though absent it is necessary to read into the act to reach that construction, namely: "All taxes, except license taxes, &c." Thus, the imposition by which plaintiff is required to pay annually $2.00 per barrel on its fish oil and $2.00 per ton on its fish meal, made of herring in whole or in part, being undoubtedly a tax, is, regardless of its kind or nature, by the language of Congress included within the uniformity clause, unless some exemp-

tion, qualification or modification of the words "all taxes" is to be found in the Organic Act (38 Stat., 616.)

No such exemption is to be found, nor is such modification or qualification contained in the proviso in Section 3 of that Act that: "This provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses," because this proviso is simply a limitation upon a limitation, that is to say, Congress made certain provisos limiting the power and authority of the Territorial Legislature, and then, fearing that its meaning might be misunderstood and its language construed to mean that the Territory had no power to levy any taxes or licenses, added, for the purpose of clarifying and rendering certain its express limitation upon the Territory's authority, a further clause to the effect that it did not mean by those express limitations that the Legislature should not have authority to raise revenue by taxes or licenses or that it, Congress, had taken away that implied power from the Territory.

The learned trial court apparently deemed this question settled, so far as it was concerned, by the decision of the Circuit Court of Appeals for the Ninth Circuit in Alaska v. Alaska Pacific Fisheries, 236 Fed. 52, and particularly by the language in that case, that:

> "Many well-considered cases might be cited holding that taxes which are levied on

occupations, business, or, it may be, franchises, are not brought within the principle of equality and uniformity in the sense that the Legislature must make the taxation of all occupations or pursuits equal."

There are to be sure many such cases, but we believe they are readily distinguishable from this case in one of three ways: either, because the decision fails to hold that a license tax is a property tax when the tax actually falls on property as in this case; or else, because there is an express authority to levy occupational taxes as distinguished from and as additional to property taxes; or lastly, because license taxes are authorized free from constitutional limitations, and that they do not contradict the decisions holding that license taxes are subject to constitutional limitations. For instance, in Bank v. Apthorp, 12 Mass. 252, 254, the Court held that an exaction of 1% per annum upon the capital of all banks was not uniform under a constitutional provision "to impose and levy proportionate and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident and estates lying within, the commonwealth," but sustained the tax under a further express proviso authorizing the imposition and levying of reasonable duties and excises upon any products, goods, &c.

In re Watson, 17 S. D. 486, 97 N. W. 463, 465, it was held that the constitutional clause "and

all taxation shall be equal and uniform," applied not only to ad valorem taxation, but also to occupational taxes.

And in Railroad Co. v. State, 49 Ohio St. 189, 30 N. E. 435, 16 L. R. A. 380, 383, the court held that a tax or fee of $1.00 per mile for each mile of railroad track was in violation of the constitutional provision that "Laws shall be passed taxing by uniform rule, all moneys, credits, investments, * * * and also all real and personal property, according to its value in money * * *."

And in Levi v. Louisville, 28 L. R. A. (Ky.) 480, 484, the Court went so far as to state that the constitutional requirement that taxes shall be uniform upon all property subject to taxation and shall be assessed at its fair cash value is violated by a municipal tax which applies the ad valorem system to real property and a license tax to personal property, although the Constitution provided for taxes based on licenses or franchises.

The Oregon Supreme Court, under a constitutional provision "that the rate of assessment and taxation shall be equal and uniform" said:

> "A distinction between a tax on a business or property and a license may be said to be that the former is exacted by reason of the fact that the business is carried on or the property is within the jurisdiction of the taxing power, and the latter is required as a condition precedent to the right to carry on such business or have such property within the jur-

jsdiction. Within these definitions a mere tax on sheep of non-resident owners can not be said to be a license unless the payment of such tax conferred some right or privilege upon such owner which did not otherwise exist. We do not understand that such is the case here. The law is entitled 'An Act to tax foreign sheep coming into the State of Oregon,' etc., and simply provides the amount of said tax and the manner of its collection. No such privileges are granted to the non-resident owner by reason of the payment of the tax, nor is the payment of such tax made a condition precedent to the right to bring sheep into the state, if, indeed, such legislation would be valid. Nor does the failure to pay the required tax render the pasturing of sheep in the state illegal, any more than the failure of a man to pay the taxes upon a farm renders the occupation of farming illegal. The law does not pretend to impose any restraint upon the sheep industry and no privilege is granted by its terms. The burden is imposed upon the property, not upon the business, and applies alike to the man who brings his sheep into the state to pasture them upon land of his own or that of the government and the man who brings his sheep into the state to pasture them upon the land of the state. We are, therefore, forced to the conclusion that it is essentially a revenue law, and void, within the rule announced in Ellis v. Frazier, 38 Ore. 462, 63 Pac. 642, 53 L. R. A. 454, 458, because the tax is not uniform and equal, nor levied with reference to the value of the property and such is the conclusion reached by courts upon substantially the same character of legislation."

Reser v. Umatilla County, 48 Ore. 326, 86 Pac. 595, 597.

The same Court also held in Ellis v. Frazier, 38 Ore. 462, 63 Pac. 642, 53 L. R. A. 454, 458, that a uniform tax of $1.25 per annum upon bicycles, regardless of their value, for the construction of bicycle paths, violated the constitutional provision, that "the legislative assembly shall provide by law for uniform and equal rate of assessment and taxation; and shall prescribe such regulation as shall secure a just valuation for taxation of all property, both real and personal • • • ."

We also refer to:

Henderson v. Insurance Co., 135 Ind 23, 38 N. E. 565, 568;

State v. Lakeside Land Co., 71 Minn. 283, 73 N. W. 970;

Minces v. Shoenig, 75 N. W. (Minn.) 711, 712;

State v. Whitcom, 122 Wis. 110, 99 N. W. 468; • • •

State v. Pennoyer, 18 Atl. (N. H.) 878;
St. Louis v. Spiegel, 2 S. W. (Mo.) 839;

Willis v. Standard Oil Co., 52 N. W. (Minn.) 652;

State v. Moore, 22 L. R. A. (N. Car.) 472;

Keowa Co. v. Dunn, 21 Colo. 185, 40 Pac. 357;

Smith v County Com., 117 Ala 196, 23 So. 141;

Livingstone v. City Council, 41 Ga. 21;
Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408;

Simms v. Parish of La., 22 La. Ann. 444.

From these decisions, we submit the conclusion is well justified that license taxes are subject to constitutional provisions as to uniformity.

(c) License taxes are also subject to Constitutional limitations as to method and amount of assessment.

But it may be said that the Organic Act (38 Stat., 616) provides that "all taxes shall be uniform upon the same class of subjects" and that all occupations, or even one class of occupations, constitute one or the same class of subjects and, therefore, a like tax upon either all occupations, or all occupations of the same class, is uniform. Such contention cannot be upheld for, not only is it admitted "that the taxes levied under each of said acts are not uniform and are not levied and collected under general laws" (Record, pp. 3 and 14), but it is also admitted that the same tax is not imposed upon all occupations of the same class, that is to say:

> "That although there are other persons and corporation in the said Territory who are engaged in the manufacture of fish oil, fish meal and fertilizer from fish, inasmuch as they do not use herring, either in whole or in part,

no license or other tax whatsoever is assessed against or levied upon them by the Territory of Alaska; and that the said business of said other persons and corporations is in all essentials the same as the business of this plaintiff and there are no existing distinctions that differentiate the said business of plaintiff from said business of said other persons and corporations." (Record, pp. 6 and 17; Certificate of Correction, p. 1.).

Congress, however, did not stop with the words "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws," but continued its limitation further by saying "and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year." (Sec. 9, Organic Act, [38 Stat., 616]).

The Territorial legislation, as has hitherto been noted, is the system in vogue for raising the general revenue for Territorial purposes, there being no other legislation for that purpose; hence, it is of course to be distinguished, if needs be, from such taxation as might be for other than "Territorial purposes" and from that class of special tax or assessment laid for the purpose of some particular improvement or betterment, such as a school or road tax, although we do not concede that such special tax would be exempt from the constitutional

limitations under discussion, at least, not if such special tax or assessment were levied for "Territorial purposes"; in other words, we contend, that all taxes are subject to, and no tax is exempt from, the limitations of the Alaska Organic Act.

Possibly it is important to bear this in mind for, if the admitted premise is true, namely, that the legislature entirely disregarded the actual value of the property although the tax is upon property, or as the allegation reads:

> "Attempts to and does levy an annual tax, upon plaintiff's property in the Territory of Alaska, for Territorial purposes in excess of one per centum of any valuation that might or could be lawfully fixed, upon plaintiff's said property, as a basis for such assessments thereof, although no provision is made in either or any of said acts for the assessment of the valuation of the plaintiff's property in the Territory of Alaska so levied upon; * * * nor are said taxes based upon an assessment according to the actual value of the plaintiff's property upon which the taxes are fixed or levied." (Record, pp. 2, 3, 13 and 14.)

—and the Territorial legislation itself forcibly supports this premise, by clearly showing the discrepancies between the various bases of taxation employed, including a flat rate, percentage rate, and unit rate, all without regard to value—then there would be no difference in principle for the Legislature, in order to raise general revenues for Territorial purposes, to lay a tax in a fixed sum

upon all persons manufacturing fish oil and fish meal, for each building or each acre of land owned, or for each machine or boat operated, or for each fish caught or processed, or for each barrel of fish oil or ton of fish meal produced, whether valueless or valuable; and this would be equivalent to laying a tax on all attorneys-at-law in a fixed sum for each law book employed in his profession, regardless of whether the books were old or new, good or bad, cheap or costly; or on the business of being a fisherman and levy a fixed sum on each fish caught; or on the business of being a logger, and lay a tax on each tree felled, or so much per foot of all logs cut or sold; or on the business of being a miner or prospector, and levy the tax on each ounce of gold, silver, or other mineral or metal found or discovered; or on the business of being a farmer and lay a tax on each bushel of wheat, barley, oats or corn raised or sold, or on the basis of each acre of land held, owned or leased, and so on ad infinitum; regardless of whether the tax exceeds 1% of the assessed valuation based on the actual value or not. But in all of these instances, the tax would fall upon property and would not be uniform, nor based upon actual value, nor within the fixed limitations of 1% of the actual value. Or, in the language of the Supreme Court of Ohio, in the case already referred to:

> "In both instances the tax is levied upon property, but it is neither levied 'according to

its true value in moneys' nor uniformly upon all property."

Railroad Co. v. State, 49 Oh. St. 189, 30 N. E. 435, 16 L. R. A. 380, 383.

While in Minces v. Schoenig, 75 N. W. (Minn.) 711, 712, the tax was sustained on the ground of police power, it was held that an ordinance providing for a 2% tax on gross receipts of conductors of gifts, fire and bankrupt sales was in violation of the Constitutional provision that "all property on which taxes are to be levied shall have a cash valuation."

And as said by the Oregon Supreme Court, in Reser v. Umatilla County, 86 Pac. (Ore.) 595, 597, we are forced to the conclusion that ostensibly the Territorial legislation is essentially a revenue law for Territorial purposes, and void, "because the tax is not uniform, * * * nor levied with reference to the value of the property."

It may be inquired, how is an occupation to be assessed, but, as said by the Supreme Court of Pennsylvania, in the case of Banger's Appeal, 109 Pa. St. 79, 94, which held that there was no uniformity in laying a tax of $100.000 upon A and a like levy of $200.00 upon B, the occupation of each being the same, "the answer is not difficult." It would be equally as easy for the Territorial Legislature to base these taxes upon assessments on an actual valuation as to use the present method; in

fact, practically all that would be necessary would be a change in the Territory's printed forms. Under the present system the Territory relies entirely upon the honesty of the licensee, who pays the tax at the end of the year, to make a true report (Sec. 2, Chap. 74, Alaska Session Laws 1917); whereas, the Territory would have no more difficulty in collecting the tax if it required the annual report of the licensee at the close of the year to state the actual value of the product, and made an assessment upon such actual value. There could be no more opportunity of fraud on the part of the licensee if required to state the actual value, either cost, buying or selling price, or other basis used, and to pay a tax levied under an assessment thereon, than in requiring the licensee to annually report the total number of units of product manufactured and to pay a fixed sum per unit thereon.

The fact that Congress by the Acts of June 6, 1900 (31 Stat., 321), and June 26, 1906 (34 Stat., 478), may have lawfully disregarded uniformity upon all occupations and not fixed the taxes therein provided under an assessment based on the actual value is, moreover, inapposite to a contention that the Territorial Legislature may do likewise, because the former has plenary power and is not restricted by the Federal Constitution in levying those taxes (Binns v. United States, 194 U. S. 491), whereas the latter is acting only under

such powers as have been conferred upon it by Congress and, hence, the exercise of those powers must be subservient to the limitations imposed in the Organic Act (38 Stat., 616) by Congress.

There is nothing unusual in Congress' thus fixing a limitation on the Territorial Legislature's power of taxation; in fact, as early as June 6, 1900 (31 Stat., 521), twelve years prior to the creation of the Territorial Legislature, Congress specifically relegated the municipal councils of Alaska, which were then the only form of local government, to a poll tax of not less than $2.00 nor more than $4.00, to a dog tax of not more than $2.00, and to a general tax for school and municipal purposes of not more than two per centum per annum on the assessed valuation; and on April 28, 1904 (33 Stat., 531), kept these limitations in force; and by the Organic Act (38 Stat., 616), Section 9 thereof, limited any incorporated town or municipality to a two per centum per annum tax for any purpose upon the asssessed valuation; reserved the right in Congress for a period of five years to impose any tax or taxes upon railways or railway property; and specifically restricted the Territorial Legislature against taxation of Federal property and against taxation of lands or other property of nonresidents higher than residents; in fact, practically the whole of said Section 9 is devoted to either expressly limiting the Territorial Legislature's

authority or to expressly reserving certain powers to Congress.

These limitatory provisions were perhaps wise considering that the Legislature has pursued a system by which it may unjustly impose a like annual occupational tax upon the poor laborer and the rich merchant, upon the poor acreage and the rich, upon the ton of low-grade gold ore and the ton of high-grade gold ore, and, even though it need not make such patent and glaring discrepancies as that to which the instance case bears testimony, yet, if it has this power to thus oppress and prohibit the plaintiff's business, it follows that it also may oppress the fisherman himself, by laying a tax on the business of being a fisherman, based upon each fish caught, so prohibitive that the Alaskan fishermen may not compete with the Canadian, Washington, Oregon or California fishermen, but needs must entirely quit his fishing business; or levy such tax alone on each king salmon caught by the "troller" or each halibut caught by the halibut fisherman, so that they are compelled to cease their customary calling; and likewise upon the logger, the prospector, the farmer, or any other industry or calling, the pursuits of all of which are necessary to the development of the Territory. Whereas, if the legislation be confined to the Congressional limitations none of these evils may result, for the poor and the rich, whether men, lands or goods, if taxed, would pay according to the

actual value of the property on which the tax fell, or, at most, subject only to a discrimination confined within a maximum range of 1% of that actual value.

We cannot conceive how a system of taxation, such as necessarily may and in the instance case actually has resulted, if this imposition be valid, could be more violative of a constitution than one which totally ignores the constitutional limitation calling, first, for uniformity, second, for confinement within a maximum levy of one per centum, third, for an actual assessment to be made on which the levy is to be based, and, fourth, for such actual assessment to be made upon the basis of the actual value of the property on which the tax falls.

The language of the Supreme Court of Minnesota, in a case before it, involving a tax of 50 cents for each ton of copper and 1 cent for each ton of iron ore mined, shipped or disposed of, which tax was imposed in the face of a constitutional provision that "all taxes to be raised in this state shall be as nearly equal as may be," and all property on which taxes are to be levied shall "have a cash valuation and be equalized and uniform throughout the state," is very apt, viz.:

> "It would be difficult to conceive of a system of taxation more obnoxious to the constitution."

State v. Lakeside Land Co., 71 Minn. 283. 73 N. W. 970.

XVI.

CONCLUSION.

Inasmuch as the taxes are illegal and the Territory of Alaska as well as the defendant were advised that plaintiff so regarded them at the time of payment thereof and that suit would be instituted to compel the refunding thereof (Record, pp. 8, 9, 19, 20), plaintiff is entitled under the admitted facts and the authorities to have judgment against the defendant for the amounts sued for (Erskine v. VanOrsdale, 82 U. S. 75, 15 Wall. 63), together with interest on said judgment (Cochran v. Sebell, 107 U. S. 625, 27 L. ed. 544), at the legal rate of eight per centum per annum (Sec. 684, Compiled Laws of Alaska, 1913 [31 Stat., 533]; Chaper 17, Alaska Session Laws, 1913: "The rate of interest in the district shall be 8% per annum, * * * .").

And while any contention as to defects in parties or as to want of duress was waived (Record, pp. 25 and 31), Alaska being an organized territory against whom no suit could lie except by its consent or under a statute (Porto Rico v. Rosaly & Castillo, 227 U. S. 270, 57 L. ed. 507; Richardson v. Fajardo Sugar Co., 241 U. S. 44, 60 L. ed. 879; Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 L. ed. 477), not only was it proper to sue the collecting officer individually, but the Territory can be depended upon to protect him. (A. T.

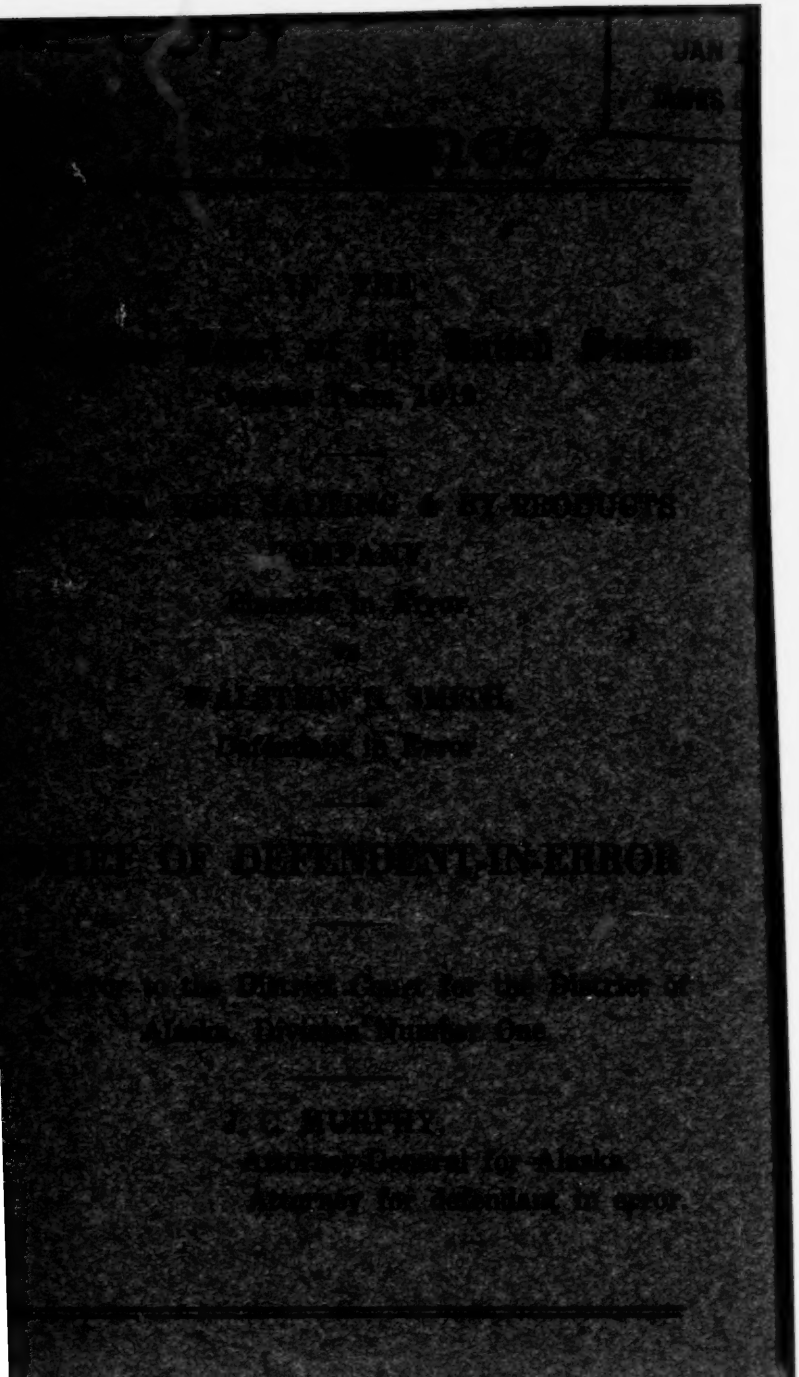
& S. R. Ry. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436; Gaur, Scott & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510; Poindexter v. Greenhow, 114 U. S. 270; Osborn v. The Bank of the United States, 9 Wheat. 783).

All of which is respectfully submitted.

Dated at Juneau, Alaska, December 2, 1920.

Robt. Robertson

Counsel for Plaintiff in Error.



IN THE

Supreme Court of the United States

October Term, 1919.

ALASKA FISH SALTING & BY-PRODUCTS COMPANY,

Plaintiff in Error,

vs.

WALSTEIN G. SMITH,

Defendant in Error.

BRIEF OF DEFENDENT-IN-ERROR

STATEMENT OF THE CASE.

This case was started in the United States District Court of the Territory of Alaska, Division No. 1, by the plaintiff, to recover from the defendant, the Treasurer of the Territory, the sum of Ten Thousand Two Hundred and Ninety-eight

(10,298.00) Dollars, together with interest, which has been paid to him by the plaintiff as taxes for the years 1917 and 1918 on the product of its plant situate at Killisnoo, Alaska, to-wit: Fish oil and fish meal, in accordance with the provisions of the Alaska Legislature, Chap. 74, Sec. 1, Sub-div. 10, Session Laws of 1917, and Chap. 33, Sec. 1, Sub-div. 8, Session Laws of 1919.

The complaint of the plaintiff was demurred to by the defendant, by his attorney, the Attorney General for the Territory of Alaska, (p. 21 of Record) which demurrer was sustained by the Court in its well-considered opinion (pp. 24 to 30 inc. of Record), and from the judgment entered (pp. 30 and 31, of Rec.) a writ of error to this Court has been sued out.

BRIEF OF THE ARGUMENT.

The assignments of error set up by the plaintiff in error and the argument in support thereof, may be grouped into two sections:

1st. That the taxing acts of the Territorial Legislature involved in this controversy are in contravention of the 5th and 14th amendments of the Constitution of the United States; and,

2nd. That the said acts violate the provisions of the Organic Act creating the Territorial Legislature and granting unto it certain taxing powers.

Necessarily if the contention of plaintiff in

error under the first grouping is correct, the case must come to an end in its favor.

ARGUMENT.

I.

ARE THE TERRITORIAL TAXING ACTS IN CONTRAVENTION OF THE 5TH AND 14TH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES BECAUSE, AS CLAIMED BY PLAINTIFF IN ERROR

A. *The tax upon fish meal and fish oil, manufactured wholly or partly from herring, is excessive in comparison with the tax levied on other lines of business?*

Plaintiff in error complains of the fact that its business is destroyed by reason of the high tax and claims as a fact that its business is at best only yielding a very moderate profit.

It is a well-known fact that the price of fish oil and fish fertilizer, like that of other commercial articles, is fluctuating, and that at the present time fish meal manufactured from herring is selling at from $112.00 to $120.00 per ton, and that fish oil manufactured from herring is selling at from 45c to 60c per gallon (being approximately ten cents per gallon higher than fish oil manufactured from salmon).

The Legislature may itself select the lines of business upon which it may impose a tax and it is beyond the province of the judiciary to control the acts of the Legislature in that respect. It is wholly immaterial what may have been the purpose or motive which animated the Legislature in imposing the tax in question. The remedy, if any, lies with the people who elect the Legislature.

As was said by this Honorable Court in

Austin vs. Boston, 7 Wall, 694, 19 L. Ed. 224

> "The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy."

Again, in

Spencer vs. Merchant, 125 U. S. 355, 31 L. Ed. 767, this Court, speaking through Mr. Justice Gray, said:

> "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected."
>
> "A state does not deny the equal protection of its laws merely by adjusting its revenue laws and taxing systems in such a way as to favor certain industries or forms of industry."

Quona vs. Kirkendall, 223 U. S. 62, 56 L. Ed. 350.

Counsel in his brief sets up the various amounts of taxes required of the various lines of business carried on in the Territory and thereby attempts to prove that the business of the plaintiff in error is excessively taxed.

When Congress, under the Organic Act, created the Territorial Legislature and authorized it to "impose other and additional taxes" it undoubtedly realized that the Territory would be unable to carry on its business with the limited amount of revenue provided for under former Congressional Acts and gave it express authority to increase the amount of taxes already imposed, and that such was its clear understanding is demonstrated by the decision of the United States Circuit Court of Appeals, in the case of

Pacific American Fisheries vs. Territory of Alaska 236 Fed. 52.

The Territorial Legislature, at its various sessions since its creation in 1912, has changed and increased the license taxes imposed upon various callings, and especially in those cases affecting the fishing business, until, at its session in 1919, it doubled the tax on canned salmon, and in addition thereto required the payment of an income tax of one per cent on the net income of all salmon canneries.

Neither is the tax on fish meal and oil, produced in whole or in part from herring, so very

high when it is remembered that practically 20,000 pounds of herring are used in the manufacture of 2000 pounds or one ton of fish meal.

Counsel for plaintiff in error has attached to his brief (pp. 48 to 55 inc.) a schedule showing the amount of license tax imposed by the Territory on businesses, trades and professions, attempting to show thereby that the license taxes imposed are fair and nominal on all other revenue sources except that of his client, which he claims is unfair, unequal and confiscatory.

The Territorial tax on canned salmon equals approximately five cents per case. In a case of salmon there are forty-eight pounds of fish, and the waste is approximately forty-two pounds per case. Therefore the Territory receives from every pound of salmon caught for canning purposes approximately $.00055. If this same rate was charged for the herring, which concededly has as much, or more nutritive value than salmon, plaintiff would have to pay $11.00 per ton instead of $2.00 for its product, and considering that plaintiff in error also extracts oil from the fish converted into meal, it is still paying the Territory in tax much less pound for pound than are the canners of salmon. But the conclusive argument to show that the Alaska Legislators were reasonable in assessing the tax complained of by plaintiff in error, is the fact that the production of fish oil and fish meal from herring is an increasing industry in Alaska. ....

Notwithstanding the tax complained of by plaintiff in error, and its claim that its business has been "taxed to death," the fact nevertheless remains that quite a number of other concerns have engaged in the enterprise with acknowledged great financial profit.

The following firms have paid into the Territorial Treasury as tax on fish oil and fish meal, made wholly or in part from herring, for the year 1919, the following sums:

Alaska Herring & Sardine Co., Port Walter Alaska	$ 784.55
Hoonah Packing Co., Hoonah, Alaska	374.00
Chatham Strait Fish Co., Big Port Walter Alaska	1129.00

The foregoing companies, together with the Alaska Reduction Company, Hawk Inlet, Alaska, and John Carlson & Co., another Alaska firm, took out licenses in accordance with Territorial regulations for the production of fish meal and fish oil from herring, for the season of 1920, and during that year engaged in manufacturing meal and oil from herring, and thus far have shown no disposition to dispute the tax equally assessed against them and plaintiff in error.

In accordance with a bulletin of the United States Department of Agriculture, No. 150, dated January 23rd, 1915, p. 66, for the season of 1913, Alaska herring yielded 1200 tons of dried fertilizer

and 260,000 gallons of oil. For this purpose there was used 57,800 barrels of 200 lbs. each, of raw hering. Allowing 52 gallons to the barrel for oil and presuming a tax of $2.00 per barrel on oil and $2.00 per ton on fertilizer, this output would have netted $12,400 in taxes.

On the other hand, had the Territory collected a tax per pound on raw herring, the same as is herein approximated from its five cents per case tax on salmon, this same herring catch would have yielded $32,790.00 in taxes.

B. *Because the tax is confiscatory and is not a revenue measure but was designed and intended to destroy the business of the plaintiff in error.*

This Court, time and again, has held that "the power to tax is the power to destroy."

McCray vs. United States, 195 U. S. 26, 49, L. Ed. 78.

The business of the plaintiff has not been singled out with the object or purpose in view of affecting the plaintiff in error in this particular case, any more than any other person or corporation which may be engaged in the business of manufacturing fish meal and oil from herring.

The tax provision acts uniformly on all persons engaged in the particular line of business. There is no distinction made between persons engaged in the particular line,—that is, manufactur-

ing said articles from herring, and there is no discrimination against the plaintiff which is not equally applicable to any other person following the same line.

It is true, as contended by plaintiff in error, that this particular tax is not imposed upon fish meal and oil made from other fish. Plaintiff in error confines much of its argument upon this feature of the case.

The learned trial Judge, in answering plaintiff's contention that "there are no existing distinctions which differentiate the business of plaintiff from the business of making fish oil out of other fishes than herring," says:

> "To persons familiar with the fishing industry in Alaska a very probable basis for classification immediately suggests itself, and that is this: While the herring is a food fish for man, yet so also is the salmon. It is well known that the salmon feed largely on herring, and it is also easily conceivable as to be said to be probable that the Legislature considered that the using of herring in large quantities for the manufacture of fish oil and fertilizer so depletes the food supply of what the Legislature considered the more valuable and desirable 'food for man' (that is, the salmon), as to seriously diminish the 'run of' the latter. If so, that fact alone would contitute a sufficient basis for classification."

The situation mentioned by the Court,—that is, the fact that the Legislature made the classification between fish meal and oil produced from her-

ring and from other fish in order to more or less protect the salmon industry, is well bourne out by the fact that there has been for a number of years, a growing agitation against the use of herring,—a recognized food fish,—for the manufacture of fertilizer, meal and oil.

The discrimination against the manufacture of meal and oil from a food fish, like herring, (as against the same material produced from salmon offal), would seem to be well justified and is in harmony with the language of this Honorable Court in

Quong Wing vs. Kirkendall, 233 U. S. 56 L. Ed. 350,

where the Court, through Mr. Justice Holmes says:

> "The legislature may make discriminations, if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary. If the State (Montana) sees fit to encourage steam laundries and discourage hand laundries, that is its own affair."

And we may say in analogy, is it not the affair of the Territory of Alaska as to whether or not it will discourage the production of fertilizer from food fishes such as herring, and encourage the production of these articles from non-food fishes and from the offal of other food fish, such as salmon?

There is a very real and far reaching difference in the two instances, and the particular point

at which that difference is emphasized by legislation is largely within the discretion of the Legislature. While it is true that fish meal and oil is produced both from herring and other fish material (salmon offal) the fact remains that oil and meal produced from herring is a distinct commercial article and superior to the article produced from salmon offal and commands a far better price. The regular Trade Journals speak, and in their market reports give the different quotations for "herring oil" and "salmon oil" and the two are never alike.

We respectfully submit that the classification is based upon some real and substantial distinction, —the one providing for a product made from food fish,—the other for a product made from waste, —and the distinction bears a reasonable and just relation to the things in respect to which such classification is imposed.

The object sought, as is admitted by plaintiff in error, is revenue. The Legislature, with full knowledge of the conditions as they exist, has said that he who takes valuable food fishes (herring), from the waters and converts them into fertilizer, must pay a tax, and he who manufactures the same article out of waste fish material, pays no tax. There is here no arbitrary or whimsical classification.

II.

HAS THE TERRITORIAL LEGISLATURE, UNDER THE ORGANIC ACT OF AUGUST 24TH, 1912, POWER TO IMPOSE THE TAX IN QUESTION?

An act of Congress, approved June 26th, 1906, (Chapter 3547, 34 Stat, 478) provides for the protection and regulation of the fisheries of Alaska. In this particular act a license tax of ten cents per barrel on fish oil, and twenty cents a ton on fish meal (fertilizer) is imposed.

The organic act of August 24th, 1912, creating the Territorial Legislature, provides a certain limitation upon the powers of the Legislature. The act provides:

> "The authority herein granted to the Legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to * * * the game, fish and fur-seal laws, or to the laws of the United States providing for taxes on business and trade; *provided further* that this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses."
>
> Sec. 3, Act of August 24th, 1912.

Under this state of the law, plaintiff in error claims that the Legislature has no authority to increase the tax theretofore imposed by Congress upon fish oil and fertilizer.

The provisions of both acts have been before

the United States Circuit Court of Appeals for the Ninth Circuit in the case of The Alaska Pacific Fisheries vs. Territory of Alaska, 236 Fed. 52, and were construed by that court against the contentions of plaintiff in error. That Court says:

> "When Congress, in 1912, conferred the legislative power which we have shown exists, while it expressly witheld power to alter or amend laws pertaining to fish and other certain subjects and saved certain laws then in force, it nevertheless unmistakably transferred power to the newly created legislative body to impose other and additional taxes and licenses; that is, power to impose taxes different from, and it might be additional to, those already in force when the Organic Act was approved. And thus by the Organic Act those general provisions for the protection of the fish which we find in the act of 1906 were kept in force without possibility of alteration, amendment, or repeal by the Territorial Legislature, and the specific license tax provided by the act of 1906 was kept in force, but with power transferred to the Legislature to impose, if it should see fit, other and additional license taxes.
>
> "We cannot agree that the portion of the act of 1906 which provides for license fees and taxes is inseparable from the other provisions of that act. The protection and encouragement of fisheries was evidently one of the main purposes of the act, and the creation of revenue by the imposition of a license tax on the business of canning and manufacturing was another purpose. Those portions of the act which have to do with the methods of carrying on fishing, and which prescribe the seasons when it may be carried on, and the waters

within which it may be carried on, are preserved; but the imposition of additional license taxes to be imposed for carrying on the business was a subject of a different character and, in the judgment of Congress, might properly be entrusted to the wisdom of the newly created Legislative assembly. The history of the passage of the Organic Act shows that somewhat peculiar conditions were presented with respect to providing for the fiscal needs of the Territory. No general property tax laws obtained. Revenue would have to be raised, and naturally some scheme of license taxation of the extensive industries carried on in the Territory presented itself for adoption. The business of fishing, therefore, became a main subject for consideration by Congress in the question of future taxation. The Congressional Records disclose that after discussion it was decided not to abridge too far the transfer of power in the Legislature to adopt its own scheme of levying taxes and licenses upon the fishing business; Congress reserving to itself, by section 20 of the Organic Act, the possible exercise of the power to nullify any law passed by the Territorial Legislature."

Under this decision it is apparent that the Territory has the power to impose new taxes and also taxes in addition to those already in force.

The act of Congress which in 1906 imposed a tax of ten cents per barrel and a tax of twenty cents per ton on fish oil cannot be considered and is not a "fishing law." It is simply a tax on a certain business imposed, not upon fishing, but on the pursuit of a certain line of business. One may

catch as many herring as one likes without being required to pay any tax or license, but one may not carry on the business of manufacturing oil or fertilizer without paying a certain tax.

The final contentions made by plaintiff in error, to the effect that the imposition of the taxes complained of are contrary to the Organic Act, in that their effect is to alter, modify, amend or repeal the Congressional Acts of June 6, 1900, and June 26th, 1906, and that the taxes imposed under the Territorial Acts are not uniform and are not levied under general laws, have all been considered by the United States Circuit Court of Appeals for the Ninth Circuit, in the case mentioned above, Pacific American Fisheries Company vs. Territory of Alaska, and were disposed of by that Court contrary to the views expressed by plaintiff in error.

Upon these points that Court said:

> "We take it to be indisputable that the creation of revenue by the imposition of license taxes upon carrying on of business is, in a general sense, a rightful subject of legislation. But in this matter inquiry into the general question is unnecessary, for, as already pointed out, we have expressed transfer of authority to the Territorial Legislature to impose license taxes. The power, therefore, being in the Legislature, such taxes may be imposed without the restrictive limitation which must control in levying taxes upon property in its usual sense. Many well-considered cases might be cited holding that taxes which are levied on occupations, business, or, it may be, fran-

chises, are not brought within the principle of equality and uniformity in the sense that the Legislature must make the taxation of all occupations or pursuits equal.

"In Binns vs. United States, 194 U. S. 486, 24 Sup. Ct. 816, 48 L. Ed. 1087, we find a helpful discussion of the taxing power of Congress with respect to Alaska. A statute passed by Congress required one 'prosecuting' a 'line of business' within Alaska to obtain a license from the District Court in Alaska and pay for the license for the 'line of business' a certain prescribed fee. The statute also provided that, if one attempted to do business without having first paid the license, he should be deemed guilty of a misdemeanor. Binns was prosecuted and convicted of violation of this statute. Upon review, the argument in behalf of Binns was that the statute referred to conflicted with section 8 of article 1 of the Constitution of the United States, which reads:

> 'The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.'

"The Supreme Court, through Justice Brewer, accepted the purpose of the Alaska law fixing license fees to be the collection of revenue, and conceded that license fees are excises within the constitutional sense of the term; but, even so, the court held that they were to be regarded as local taxes imposed for the purpose of raising funds to support the administration of local government in Alaska, and that Congress had plenary power, except as con-

trolled by the Constitution, to legislate for the Territory of Alaska. The court said:

> 'It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a Legislature elected by the citizens of the Territory * * * For Alaska, Congress has established a government of a different form. It has provided no legislative body, but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that Territory. Instead of raising revenue by direct taxataion upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes * * * In the exercise of this power, Congress, like any state Legislature unrestricted by constitutional provisions, may at its discretion, wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property.'

"We think these views are applicable and controlling in the present case, because, when Congress gave to the Legislature of the Territory the power to legislate upon all rightful subjects not inconsistent with the laws of the United States, it thereby exercised the right to transfer the power which it itself had, and the Legislature could use it, subject, of course, to such constitutional limitations as always surrounded the Congressional power and to such further limitations as Congress might see fit to throw about the power transferred."

CONCLUSION

From the foregoing brief and argument following the decision of the Circuit Court of Appeals for the Ninth Circuit (236 Fed. 52) and the able opinion of the United States District Judge in sustaining the demurrer (Record, pp. 24-30), we believe that the Court will agree that neither the Constitution of the United States, nor the Organic Act creating the Territorial Legislature for Alaska have been violated by the passage of the license tax complained of by plaintiff in error, and that this Honorable Court will see fit to sustain the judgment of the lower court.

Respectfully submitted,

J. C. MURPHY,
Attorney-General for Alaska.
Attorney for defendant in error.

SUPREME COURT OF THE UNITED STATES.

No. 166.—October Term, 1920.

Alaska Fish Salting and By-Products Company, Plaintiff in Error, vs. Walstein G. Smith. } *In Error to the District Court, Division No. 1, of the Territory of Alaska.*

[*January 31, 1921.*]

Mr. *Justice* Holmes *delivered the opinion of the Court.*

This is an action to recover the amount of taxes levied under statutes of Alaska which the plaintiff alleges to be contrary to the Act of Congress of August 24, 1912, c. 387, § 3, 37 Stat 512, creating a legislative assembly in the Territory of Alaska, and to the Constitution of the United States. Judgment was given for the defendant upon demurrer to the complaint, the parties agreeing that the foregoing grounds of recovery were the only matters in dispute. The statutes attacked, viz: May 1, 1913, April 29, 1915, and May 3, 1917, levy license taxes of two dollars a barrel and two dollars a ton respectively, upon persons manufacturing fish oil, fertilizer and fish meal in whole or in part from herring. The Act of Congress after giving effect to the Constitution and laws of the United States in the Territory provides that the authority therein granted to the legislature "to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the . . . fish . . . laws . . . of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade . . . *Provided further*, that this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses." Some reliance is placed also upon § 9 that all taxes shall be uniform upon the same class of subjects, &c., and that no tax shall be levied for territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year.

The complainant alleges that the tax will prohibit and confiscate the plaintiff's business, which is that of manufacturing fish

oil, fertilizer, fish meal and by-products from herring either in whole or in part; that the tax unreasonably discriminates against the plaintiff, as it levies no tax upon the producers of fish oil, &c., from other fish, and is otherwise extortionate; and that it contravenes the Act of Congress in lack of uniformity and in exceeding one per centum of the actual value of the plaintiff's property. The prophecies of destruction and the allegations of discrimination as compared with similar manufactures from salmon are denied by the Attorney General for Alaska, the latter denial being based upon a comparison of the statutes which of course is open. We are content however to assume for the purposes of decision that, not to speak of other licenses, the questioned Acts do bear more heavily upon the use of herring for oil and fertilizer than they do upon the use of other fish. But there is nothing in the Constitution to hinder that. If Alaska deems it for its welfare to discourage the destruction of herring for manure and to preserve them for food for man or for salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon similar uses of other fish or of the offal of salmon, it hardly can be said to be contravening a Constitution that has known protective tariffs for a hundred years. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357. Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. *McCray* v. *United States*, 195 U. S. 27. *See Quong Wing* v. *Kirkendall*, 223 U. S. 59. *Mugler* v. *Kansas*, 123 U. S. 623; *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 482. We need not consider whether abuses of the power might go to such a point as to transcend it, for we have not such a case before us. The Acts must be judged by their contents not by the allegations as to their purpose in the complaint. We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation. The case is different from those where the power to tax is limited to inspection fees and the like, as in *Postal Telegraph & Cable Co.* v. *Taylor*, 192 U. S. 64, 72.

But it is said that however it may be with regard to the Constitution taken by itself, the statutes brought into question are contrary to the Act of Congress from which the local legislature derives its power. In the first place they are said to be an attempt

to modify or repeal the fish laws of the United States. The Act of Congress of June 6, 1900, c. 786, § 29; 31 Stat. 321, 331; Alaska Compiled Laws, § 2569; imposes a tax on fish oil works of ten cents per barrel and on fertilizer works of twenty cents per ton, repeated in slightly different words by the Act of June 26, 1906, c. 3547; 34 Stat. 478; Alaska Compiled Laws, § 259. But these are not fish laws as we understand the phrase. It is argued, however, that at least they import a license, *License Tax Cases*, 5 Wall. 462, 470, and that a tax alleged to be prohibitory flies in their teeth. It would be going far to say that a tax on fish oil works in general terms imported a license to a specific kind of works deemed undesirable by the local powers, and when we take into account the express and unlimited authority to impose additional taxes and licenses we are satisfied that the objection should not prevail. We confine our decision to the statutes before us, repeating in this connection that they must be judged by their contents not by the characterization of them in the complaint.

The requirement of uniformity in § 9 is disposed of by what we have said of the classification when considered with reference to the Constitution. The legislature was warranted in treating the making of oil and fertilizer from herring as a different class of subjects from the making of the same from salmon offal. The provisions against taxing in excess of one per centum of the assessed valuation of property does not apply to a license tax like this. This is not a property tax. *Alaska Pacific Fisheries* v. *Territory of Alaska*, 236 Fed. Rep. 52, 61. The objection that the plaintiff in error is doubly taxed, first by the United States and then by the Territory, is answered by the express authority to levy additional taxes to which we have referred heretofore. Without going into more detail we are of opinion that the tax must be sustained.

Judgment affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.